(16,233.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, AND WILLIAM P. FORBIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1897.

* * * * * * *

01-7 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GENZberger, James W. Forbis, and William P. Forbis, Plaintiffs, *vs.* WILLIAM A. CLARK, JOSEPH K. CLARK, Henry S. Clark, and William Woodward, Defendants.	Amended Complaint.

Now comes the above-named plaintiffs, by leave of court first had and obtained, and files this their amended complaint and complain of the above-named defendants, and for cause of complaint allege—

That the above-named plaintiffs and the defendants William A. Clark and Joseph K. Clark are now and at all times hereinafter named were the owners of the following-described property, situated in the "Summit Valley" mining district, in Silver Bow county, State of Montana, to wit:

08 That portion of that certain quartz lode mining claim known as and called the "Niagara" Lode mining claim and designated as lot numbered two hundred and seventy-nine (279), in township numbered three (3) north of range numbered seven (7) west, which is described as within the following metes and bounds, to wit: Beginning at corner No. 1 of survey No. 1945, the said Niagara lode, lot No. 279 aforesaid, from which the quarter-section corner on the west boundary on section six (6), T. 3 N., R. 7 W., bears north 51 11′ west 2,786.2 feet, and running thence south 3 53′ east 336 feet to corner No. 2 of said Niagara lode, said corner No. 2 being on the west end line of survey No. 596, the Black Rock lode, lot No. 53; thence north 2 west along the west end line of said Black Rock lode 259 feet to corner No. 4 of said Black Rock lode; thence south 77 15′ east along the north side line of said Black Rock lode 1,283.5 feet; thence north 0 17′ west 394 feet to a point on the fourth course of said Niagara lode; thence north 88 05′ west along the fourth course of said Niagara lode 190.25 feet to corner No. 5 of said Niagara lode, said corner No. 5 being on the south side line of survey No. 1568, the Damarat lode, lot No. 223; thence south 78 west along said south side line of said Dama-

09 rat lode 741 feet to corner No. 3 of said Damarat lode; thence north 1 30′ east along the west end line of said Damarat lode 9.5 feet to a point on the south side line of the Deadwood lode, survey No. 999, lot No. 111; thence north 73 15′ west along said south side line of said Deadwood lode 366 ft. to the place of beginning.

That the said property is held by the said plaintiffs and the said defendants, William A. Clark and J. K. Clark, in the following proportions as tenants in common, to wit, the said plaintiffs own-

ing altogether two undivided thirds ($\frac{2}{3}$) interest in the said property, and the said William A. Clark and Joseph K. Clark owning one undivided third ($\frac{1}{3}$) interest therein, each and all holding said property as tenants in common.

That the said Niagara Lode claim is a quartz lode claim and as such embraces a quartz vein the top or apex of which crosses the south line of the Niagara Lode claim 560 feet in a westerly direction from the northeast No. 1 corner of the Black Rock Lode claim, lot No. 53, in T. 3 N., R. 7 W., the said south line of the Niagara lode and the north line of the Black Rock lode at the point of the departure of the said vein being identical; and the said vein
010 from the said point of entering the south line of the said Niagara Lode claim continues, with its top or apex within the surface lines of the Niagara Lode claim, easterly until it crosses the end line of the said Niagara Lode claim, and that the said vein in its downward course or dip departs from within the surface lines of the said Niagara Lode claim into and under the said Black Rock Lode claim, which lies south of and adjoining the said Niagara Lode claim.

That heretofore, to wit, on or about the 1st day of March, 1890, as plaintiffs allege on information and belief, the said defendants without plaintiffs' consent, by underground workings, levels, winzes, stopes, and shafts, entered upon the said vein upon its downward course or dip, began to extract and ever since have continued to extract and are now extracting therefrom large quantities of ore, which at the date of the commencement of this action amounted in value to the sum of two hundred and thriteen thousand dollars, and which ore was extracted from the vein hereinbefore described upon its downward course or dip and on that portion thereof which has its apex upon the "Niagara" Lode claim, hereinbefore described.

011 That the plaintiffs, as tenants in common, as aforesaid, are entitled to two-thirds value of all ores extracted from the said vein, as hereinbefore set forth, which amounts to one hundred and forty-two thousand dollars ($142,000).

That the defendants, after extracting said ore from the said vein as aforesaid, converted the same to their own use, and ever since have held and now hold the proceeds thereof to their own use and fail and refuse to account to these plaintiffs for the same or any part thereof, although requested so to do, and still continue, against plaintiff's will and consent, to extract ore from said vein as aforesaid on its downward course or dip, both within and without the vertical side lines of the said Niagara Lode claim.

That by reason of the said acts as aforesaid these plaintiffs have been damaged in the sum of one hundred and forty-two thousand dollars.

Wherefore plaintiffs pray judgment against the said defendants for the sum of one hundred and forty-two thousand dollars, with legal interest thereon from the 1st day of March, 1890, and for costs of suit herein expended, and further for the value of two-thirds ($\frac{2}{3}$)

of all ores extracted from said vein during the pendency of
012 this action, and that that portion of the vein hereinbefore described the top or apex of which lies within the side lines of the said Niagara Lode claim and of its dips, spurs, and angles be adjudged and decreed the property of these plaintiffs, as such tenants in common, and that defendants be adjudged and decreed to account to these plaintiffs for all ores extracted therefrom prior to the commencement of this action and during the pendency thereof, and for other and further relief.

(Signed) JOHN F. FORBIS,
Attorney for Plaintiffs.

STATE OF MONTANA, }
County of Silver Bow, } *ss:*

James W. Forbis, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

(Signed) JAMES W. FORBIS.

Subscribed and sworn to before me this 9th day of August, 1892.

(Signed) CHAS. MATTHISON,
Notary Public.

013 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, James W. Forbis, and William P. Forbis, Plaintiffs, *vs.* WILLIAM A. CLARK, JOSEPH K. CLARK, Henry S. Clark, and William Woodward, Defendants.	Answer of W. A. Clark to Amended Complaint.

Now comes the above-named defendant, William A. Clark, and for his separate answer to the amended complaint of plaintiffs on file herein—

Denies that the lode or vein described by plaintiffs in said complaint crosses the south line of the Niagara Lode claim 560 feet in a westerly direction from the northeast No. 1 corner of the Black Rock Lode claim, but avers that said vein crosses the south line of the Niagara Lode claim about 200 feet in a westerly direction from the northeast No. 1 corner of said Black Rock Lode claim.

Denies that any lode or vein the top or apex of which is inside of the said Niagara Lode claim in its downward course or
014 dip departs from within the side lines of the said Niagara Lode claim into or under said Black Rock Lode claim, which lies south of and adjoining said Niagara Lode claim.

Denies that on the first day of March, 1890, or at any other time or at all this defendant, by underground workings, levels, winzes, stopes, shafts, or otherwise or at all, entered into or upon any vein, lode, or ledge the top or apex of which was or is inside the surface lines of said Niagara Lode claim upon its downward course or dip, or otherwise or at all, or at any time began to extract or ever since has continued to extract or is now extracting or was at the time of the commencement of this suit extracting from said vein large or any quantities of ore at all.

Denies that this defendant ever at any time by any means whatever extracted any quartz or ore from any vein or lode the top or apex of which lies within the boundaries of said Niagara Lode claim.

Denies that the value of any ore extracted by this defendant or any of the defendants in this suit from any vein the top or apex of which lies within the boundaries of said Niagara Lode claim at the commencement of this action or at any time at all amounted or now amounts in value to the sum of $213,000 or any sum
015 or amount at all.

Denies that plaintiffs as tenants in common or otherwise or at all are entitled to two-thirds in value or any other part or portion of any quartz or ore extracted by this defendant from the vein claimed by plaintiffs in said complaint or from any other vein or at all which amounted to $142,000 or any sum or amount whatever.

Denies that after extracting said or any ore from the vein described in plaintiffs' complaint this defendant converted the same or any part thereof to his own use, or ever since has held or now holds the proceeds of any ore at all in which plaintiffs have or ever had any interest at all, or fails or refuses to account to plaintiffs for any part thereof.

Denies that defendant still continues, against plaintiffs' will or consent or otherwise or at all, to extract ore from any lode or vein in its downward course or dip or at all the top or apex of which lies within the vertical side lines of said Niagara Lode claim.

Denies that by reason of extracting or converting any ore on any lode or vein the top or apex of which lies within the lines of
016 said Niagara Lode claim, or any veins in which plaintiffs have any interest, that plaintiffs are or have been damaged in the sum of $142,000 or any sum or amount whatever or damaged in any sum or amount at all by any act of this defendant.

Denies that plaintiffs have been damaged in any sum or amount whatever or at all by any act or acts of this defendant.

Defendant, further answering, avers the fact to be that said Niagara Lode claim was not located on or along the course or strike of any vein the top or apex of which lies within the lines of said lode claim, but was located across said veins and across the vein from which plaintiffs claim that defendants have extracted ore belonging to plaintiffs, and that by reason thereof the side lines of said Niagara Lode claim became and are the end lines of said Niagara Lode claim and should be drawn down vertically, and for

the reason that said side lines became the end lines of said lode claim plaintiffs have no right, in case said veins or any of them should upon their downward course or dip depart from the side lines of said Niagara Lode claim and under or into said Black Rock Lode claim, to follow the same in said downward course or dip into or under the side line of said Black Rock claim.

017 That the vein or lode from which plaintiffs claim the defendants in this suit mined and extracted the ore sued for and which embraces the supposed trespass had and has its top or apex within the side lines of said Black Rock Lode claim.

Denies that said plaintiffs or any of them, as owners or otherwise, were or are entitled to the vein or lode upon which the alleged trespass was committed, or are entitled to the same in its downward course outside of the side planes of the surface location of said Niagara Lode claim, drawn down vertically, or are entitled to any part or portion of the ore of said vein outside of the surface lines of said Niagara Lode claim, and especially that portion thereof from which it is alleged that the said quartz and ore was taken and removed by the defendants in this action.

And this defendant, for further answer and defense to said amended complaint and alleged trespass therein contained, avers that the defendants in this action are the owners of and entitled to the possession of said Black Rock Lode claim and all veins, lodes, and ledges therein, and all quartz, ore, or mineral bearing rock therein contained.

018 That at and before and continually during the time of the alleged trespass this defendant had and held a lease from all the other defendants in this action to all their right, title, and interest in and to said Black Rock Lode claim, with all the veins, lodes, and ledges, the tops or apexes of which were within the lines of said Black Rock Lode claim, and rights, easements, and privileges thereto lawfully belonging; that as such lessee this defendant went into the actual possession of said Black Rock Lode claim, and was entitled to the possession of the same, with the right to mine and extract quartz, rock, or ore therefrom without let or hindrance from the other defendants in this suit, and was entitled to and did manage, mine, and conduct said Black Rock Lode claim during all the time of the alleged trespass set out in plaintiffs' complaint and long prior thereto, and has, before the commencement of this suit and before the time of the supposed trespass mentioned in said complaint, continually, as such lessee, mined and extracted quartz and ore from said Black Rock Lode claim, and particularly the quartz and ore mentioned in said complaint and which is claimed by plaintiffs, and which constitutes the supposed trespass set out in plaintiffs' complaint, and was to and has delivered to the

019 other defendants herein one-fourth of the proceeds of the ore mined and taken by this defendant from said Black Rock Lode claim in pursuance of said lease and terms thereof, and by reason thereof the other defendants in this suit are improperly joined with this defendant, and there is a defect or misjoinder of parties defendant.

That this defendant at the time of mining and extracting the ore from said Black Rock Lode claim, which constitutes the supposed trespass set out in plaintiffs' complaint, acted in good faith and then believed and still believes that all the said ore was mined and extracted from ledges or veins the tops or apexes of which lie inside of the said Black Rock Lode claim, and therefore in good faith, believing that the other defendants herein were entitled to one-fourth of the proceeds of the said ore as belonging to said Black Rock Lode claim, delivered the same to them according to their respective interests.

That the quartz or ore which constitutes the supposed trespass was mined and taken by this defendant from lodes or veins the tops or apexes of which lie within the surface lines of said Black Rock Lode claim drawn down vertically.

020 That if the vein described by plaintiffs in their complaint or any or all other veins the tops or apexes of which lie inside of the surface lines of said Niagara Lode claim in their des-ent or dip into the earth dip under or into the side lines of said Black Rock Lode claim drawn down vertically such veins unite with and become a part of the vein or lode from which this defendant mined and extracted the ore which constituted the supposed trespass, and the top or apex of which lies inside of the surface lines of said Black Rock Lode claim at a point below the places and points from which this defendant extracted most of said ores complained of and described in said complaint, and the balance of said ore was mined and extracted below the point of intersection of said veins.

That said Black Rock Lode claim is older and was located prior to said Niagara Lode claim, and that the patent for said Black Rock Lode claim was issued prior to the issuance of any patent for said Niagara Lode claim, and therefore all of said veins, whether their apex- *is* within the surface lines of said Niagara Lode Claim or not below said point of intersection above described, belong to and are the property of the defendants in this suit, and they are entitled to the possessson thereof and to all the ores therein

021 contained.

Wherefore this defendant, having fully answered said amended complaint and the cause of action sought to be set up therein, asks judgment for his costs and disbursements in this behalf expended.

(Signed) ROBINSON AND STAPLETON,
GEO. HALDORN,
Attorneys for Defendant Wm. A. Clark.

STATE OF MONTANA, }
County of Silver Bow, } *ss:*

William A. Clark, being first duly sworn, says as follows:

That he is the defendant in the above-entitled action answering in the above answer; that he has heard said answer read and knows the contents thereof, and the same is true of his own knowledge.

(Signed) WILLIAM A. CLARK.

Subscribed and sworn to before me this 30th day of November, 1892.

(Signed) G. W. STAPLETON,
Notary Public.

022 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GANZBERGER, James W. Forbis, and William P. Forbis, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants.
} Replication.

Now come the plaintiffs in the above-entitled action, and for replication to the separate answer of William A. Clark herein on file—

I. Deny that the vein described in the plaintiffs' complaint crosses the south line of the Niagara Lode claim at a point two hundred feet in a westerly direction from the northeast corner of the Black Rock Lode claim, but alleges that the said vein crosses as in the plaintiffs' complaint set forth.

II. Deny that the said Niagara Lode claim was not located on or along the course of strike of any vein the top or apex of which lies within the lines of the said Niagara Lode claim, or that the Niagara Lode claim was located across the veins described in plain-
023 tiffs' complaint.

But allege the fact to be that the said vein, although crossing the side line- of said claim, runs almost parallel therewith and in nearly the same direction.

Deny that by reason of the crossing of the said vein the side lines of the said Niagara Lode claim became or were the end lines of the said Niagara Lode claim, or that the same should be drawn down vertically, or that by reason of the course of the said vein the side lines of the said Niagara Lode claim became the end line- of the said location, or that plaintiffs have no right in case said veins or any of them should upon their downward course or dip depart from the side lines of the Niagara Lode claim and under or into the Black Rock Lode claim to follow the same in its downward course or dip into or under the side lines of the Black Rock Lode claim.

III. Deny that the vein or lode from which the defendants mined and extracted the ore sued for in this action has its top or apex within the side lines of the Black Rock Lode claim.

IV. Deny that the defendants in this action are the owners
024 or entitled to the possession of all veins, lodes, or ledges therein or all quartz, ore, or mineral-bearing rock therein contained.

But the plaintiffs allege wherever such veins have their top- or apex- outside of the Black Rock Lode claim that the defendants have no right to the said veins or the ore therein contained by virtue of the said Black Rock location.

V. Deny that the defendant, as lessee or otherwise, extracted the

quartz described in plaintiffs' complaint from the vein therein described under or by virtue of any lease from the co-owners in the Black Rock Oode claim, and deny that by virtue of any lease whatever executed by any person whatsoever the defendant had any right to mine or explore on the vein described in plaintiffs' complaint in that portion thereof having its apex within the Niagara Lode claim as described in plaintiffs' complaint.

Deny that the other defendants in this suit are improperly joined with the defendant W. A. Clark, or that there is any defect or misjoinder of parties defendant.

VI. Deny on information and belief that -he defendant is
025 extracting the ore from the vein described in plaintiffs' complaint acted in good faith or with the belief or still believes that all the said ore was mined or extracted from the ledges or veins the top- or apex- of which lie inside of the Black Rock Lode claim.

VII. Deny that the quartz or ore extracted from the vein described in plaintiffs' complaint was mined or taken by said defendant from lodes or veins the tops or apexes of which lie within the surface lines of the said Black Rock Lode claim drawn down vertically.

Deny that the vein described in plaintiffs' complaint or any other veins which have their top- or apex- within the surface lines of the Niagara Lode claim unite with or become a part of the vein or lode from which the defendant mined or extracted the ore claimed in plaintiffs' complaint the top or apex of which lies inside of the surface lines of the Black Rock Lode claim at any point whatever, or that if such veins do unite that the defendant extracted such ore below the point of intersection.

VIII. Deny that by reason of any priority or otherwise any vein having its top or apex within the surface ground of the Niagara Lode claim belongs to or is the property of the defendant in this suit below any point of intersection, or that the defend-
026 ants are entitled to possession of any such veins or ore contained therein.

Wherefore the plaintiffs, having fully replied, pray judgment as in their complaint prayed.

(Signed) JOHN F. FORBIS,
Attorney for Plaintiffs.

STATE OF MONTANA, }
County of Silver Bow, } ss:

James W. Forbis, being first duly sworn, says on oath that he is one of the plaintiffs in the above-entitled cause; that he has read the foregoing replication and knows the contents thereof, and that the facts therein stated are true except as to matters and things therein stated on information and belief, and as to such matters he believes it to be true.

(Signed) JAMES W. FORBIS.

Subscribed and sworn to before me this 10th day of March, 1893.

(Signed) WILLIAM J. NAUGHTEN,
Notary Public.

027 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

W. F. FITZGERALD *et al.*, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants. } Verdict.

We, the jury in the above-entitled action, find for the plaintiffs and assess their damage at the sum of twenty-nine thousand three hundred fifty-one and $\frac{1}{100}$ dollars ($29,351.01), being two-thirds of the value of ores extracted by the defendant W. A. Clark from the ground in controversy.

(Signed) W. T. BOARDMAN, *Foreman.*

Dated this — day of July, 1893.

028 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD *et al.*, Plaintiffs,
vs.
W. A. CLARK *et al.*, Defendants. } Special Findings.

The jury will answer the following questions:

(1.)

Q. At what point on the line between the Black Rock and Niagara Lode claims does the apex of the vein in controversy pass entirely within the lines of the Niagara Lode claim?

A. At a point five hundred and thirteen feet (513 ft.) westerly from the northeast corner of the Black Rock Lode claim.

(Signed) W. T. BOARDMAN, *Foreman.*

(2.)

Q. What was the entire market value of ores extracted by
029 William A. Clark from the vein in controversy east of the point where such vein passes entirely within the Niagara Lode claim after deducting the cost of mining and hoisting such ore?

A. Forty thousand eight hundred sixty-three and $\frac{81}{100}$ dollars (40,863.81).

(Signed) W. T. BOARDMAN, *Foreman.*

030 In the District Court of the Second Judicial District, State of Montana, in and for the County of Silver Bow.

WILLIAM F. FITZGERALD, MEYER GANZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Plaintiffs,
vs.
WILLIAM A. CLARK, JOSEPH K. CLARK, HENRY S. CLARK, and WILLIAM WOODWARD, Defendants. }

This action came regularly on for trial at the July, 1893, term of the above-entitled court upon the amended complaint of the plain-

tiff-, the separate answer of W. A. Clark and of J. K. Clark, H. S. Clark, and William Woodward thereto, and the plaintiffs' replications to the said separate answers.

A jury was regularly impanneled to try the cause, and testimony was introduced on the part of the plaintiffs and defendants, and the jury was regularly instructed by the court as to the law in the premises.

And it appearing from the separate answers that William A. Clark, one of the defendants, is the person responsible for the
031 tresspas- alleged in the said complaint, and the plaintiffs having in open court consented to hold William A. Clark and having disclaimed any claim of damage against any of the other defendants named in the said action—

The jury, after deliberating upon their verdict, subsequently came into court with a general verdict in favor of the plaintiffs and assessing their damages at the sum of $29,351.01, being two-thirds of the value of ores extracted by the defendant William A. Clark from the ground in controversy, and the jury also returned special findings to the effect that the apex of the vein in controversy passes entirely within the lines of the Niagara Lode claim at a point 513 ft. westerly from the northeast corner of the Black Rock Lode claim, and also that the entire market value of ores extracted by William A. Clark from the vein in controversy east of the point where such vein passes entirely within the Niagara Lode claim, after deducting the costs of mining and hoisting such ores, is the sum $40,863.81.

Whereupon it was ordered by the court that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, are the owners of two undivided thirds ($\frac{2}{3}$)
032 interest in the premises and of the vein as described in said verdict and special findings, and that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, do have and recover of the defendant William A. Clark two-thirds of the entire amount extracted by the said William A. Clark east of the line where the entire apex of the vein described in the complaint passes within the Niagara Lode claim; which entire amount as found by the said special findings is the sum of $40,863.81.

Wherefore, by virtue of the law and by reason of the premises, it is ordered and adjudged that the entire apex of the vein in controversy and described in the complaint passes entirely within the lines of the Niagara Lode claim at a point on the line between the Niagara and Black Rock Lode claims 513 feet westerly from the northeast corner of the Black Rock Lode claim.

And it is further ordered and adjudged that the plaintiffs, William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, do have and recover of the defendant, William A. Clark, the sum of $27,242.54 (being two-thirds of the sum of $40,863.81), and that the plaintiffs do have and recover of the de-

fendant, William A. Clark, the further sum of two hun-
033-120 dred thirty-four and $\frac{50}{100}$ ($234.50) dollars costs incurred by the plaintiffs in this action.

(Signed) H. A. NEIDENHOFEN, *Clerk*,
By JAMES F. WILKINS,
Deputy Clerk.

Dated this 26th day of July, 1893.

* * * * * * *

0121 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Petition for Writ of Error.

To the honorable the supreme court:

Your petitioner, William A. Clark, plaintiff in error in the above-entitled cause, by his attorneys, Smith & Word, files this his petition for a writ of error against the defendants in error above named in the title of this cause, and complains that in the records and proceedings and in the rendition of judgment in the above-entitled cause in the supreme court of the State of Montana, the same being the highest court and court of last resort in said State, holden
0122 at the city of Helena, in said State of Montana, at the October term, A. D. 1895, to wit, on the 11th day of November, A. D. 1895, against the plaintiff in error, William A. Clark, and in favor of the above-named defendants in error, manifest error has been committed and hath intervened in said action, to the great damage and injury of your petitioner and plaintiff in error, William A. Clark.

And your petitioner further shows to this honorable court that in the above-entitled cause there is involved a Federal question and the construction of a statute of the United States, to wit, sections 2320 and 2322, chap. six, title 32, of the Rev. Stats. of the United States, entitled "Public lands;" that there is involved in said cause this question, to wit, whether a mineral claimant the apex of whose vein or lead passes through one end line and one side line of the surface lines of his claim or location as designated on the surface of the ground has any right to follow such vein on its dip or pitch into the earth outside of and beyond his own surface lines extended vertically downward and underneath the surface and within the side lines of another's claim, extended vertically downward.

And there is involved the further question in said cause whether, when the apex of a lead, lode, or vein of mineral passes
0123 through one end line and also through one side line of the surface location, as designated upon the surface of the ground, such lines, through which the apex of said vein passes, in effect become end lines; and whether, when such lines through which the

apex of the vein passes, not being parallel to each other, the claimants (being the defendants in error) or owners of such vein or lode whose apex passes through such end line and such side line has any extralateral rights or any right, under sections 2320 and 2322 of the Rev. Stats. of the United States, to follow such vein or lode on its dip or pitch into the earth outside of and beyond the surface lines of his said claim extended vertically downward and underneath and within the surface lines of the claim of plaintiff in error extended vertically downward.

That said questions are raised and presented by the pleadings in the above-entitled cause, and the honorable the supreme court of Montana at the date aforesaid held and decided and rendered a final judgment in said court, finding and declaring that the defendants in error, being the owners of an undivided two-thirds of the Niagara quartz lode claim, the apex of the vein of said claim
0123½ passing through the east end line of said claim and through the south line of said Niagara claim (said lines being almost at right angles to each other), had a right to follow so much of said vein as had its apex within the surface lines of said Niagara claim on its pitch or dip into the earth through the south and underneath the surface and within the lines of the Black Rock claim, extended vertically downward, said Black Rock claim being the property of your petitioner, the plaintiff in error.

Wherefore your petitioner and plaintiff in error prays for the allowance of a writ of error and for such other process as may cause the said judgment and proceedings to be corrected by the said Supreme Court of the United States.

ROBERT B. SMITH AND
ROBERT L. WORD
Of Helena, Montana, Attorneys and Solicitors for the Plaintiff in Error.

0124 In the Supreme Court of Montana.

WILLIAM F. FITSGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Assignment of Errors.

The plaintiff in error, William A. Clark, through his attorneys and counsellors, makes the following assignment of errors in the above-entitled cause, heard and determined at the city of Helena, State of Montana, in the supreme court of said State, on the 11th day of November, A. D. 1895, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

0125 1.

It appears from the pleadings in the above-entitled cause that the defendants in error above named are the owners of an undivided

two-thirds of the Niagara quartz lode claim, and the plaintiff in error is the owner and in possession of the Black Rock quartz lode claim; and it further appears from said pleadings that the north side line of the Black Rock lode claim is also the south side line of the Niagara lode claim, owned in part by the defendants in error; and it further appears from the pleadings in said cause and from the judgment rendered therein that the apex of the vein or lode of the Niagara claim passes through the east end line of said claim and running thence westerly at a point 513 feet from the northeast corner of the Black Rock claim the apex of said vein or lode of the Niagara claim passes through the south side line of said Niagara lode or claim, and, notwithstanding such fact, the supreme court of the State of Montana decided that the defendants in error had a right to follow that portion of said vein which had its apex inside of the surface lines of the Niagara claim on its dip or pitch into the earth to the south, underneath and within the surface lines of the Black Rock claim extended vertically downward, claimed,
0126 owned, and possessed by the plaintiff in error, and in this the court erred.

2.

The said supreme court of Montana erred in deciding that where the apex of a vein, lode, or ledge passed diagonally through one end line and one side line of the Niagara claim, owned by defendants in error, that said defendants in error had a right to follow the said vein or lode on its dip into the earth outside of their surface lines extending vertically downward and into and underneath the surface and within the surface lines of the Black Rock claim extending vertically downward, the said last-named claim being owned and possessed by the plaintiff in error.

3.

The said supreme court of Montana erred in deciding that where the apex of a vein or lode crosses two surface lines of a mineral claim, which said lines are not parallel to each other, that the owners of such a vein or lead have the right to follow such a vein or lode on its dip into the earth underneath the surface and within the surface lines of an adjoining claim.

0127 4.

The said supreme court of Montana erred in disregarding that portion of section 2320 of the Rev. Stats. of the United States requiring the end lines of each location or claim to be parallel to each other.

5.

The said supreme court of Montana erred in refusing to hold that where the apex of a vein or lode crosses one end line and one side line of a claim such side line becomes in effect an end line.

6.

The said supreme court of Montana erred in refusing to follow the law as announced by the Supreme Court of the United States in case of King *vs.* Amy and Silversmith Co., 152 U. S., 222, construing section- 2320 and 2322 of the Rev. Stats. of the United States.

7.

The said supreme court of Montana erred in attempting to lay down a rule by which the lines of a mining claim or mine
0128 can be readjusted so as to give the holder thereof extralateral rights and permit him to follow his vein on its dip into the earth without having parallel end lines crossed by the apex of the vein or lode.

ROBERT B. SMITH AND
ROBERT L. WORD,
Of Helena, Montana, Attorneys and Solicitors for Plaintiff in Error, William A. Clark.

0129 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana, before you or some of you, between William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, defendants in error, and William A. Clark, plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do
0130 command you, if the judgement be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the customs and laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

GEO. W. SPROULE,
[SEAL.] *Clerk of the Circuit Court of United States, Ninth Circuit, District of Montana.*

Allowed by—
WILLIAM Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Service of a copy of the foregoing writ is duly acknowledged, at Silver Bow county, Montana, this 26th day of December, A. D. 1895.

JOHN F. FORBIS,
Attorney and Solicitor for the Defendants in Error.

0131 Copy of the above writ this day left with me for service. Dated Dec. 24th, 1895.

BEN. WEBSTER, *Clerk*
(Per W. D. GARDINER).

0132 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis are defendants in error and William A. Clark in plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy
0133 justice should not be done to the parties in that behalf.

Witness the Honorable William Y. Pemberton, chief justice of the supreme court of the State of Montana, this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] WILLIAM Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the writ of error mentioned therein accepted and acknowledged at Silver Bow county, State of Montana, this December 26th, A. D. 1895.

JOHN F. FORBIS,
Attorney and Solicitor for Defendants in Error.

0134 In the Supreme Court of Montana.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS, and WILLIAM P. FORBIS, Defendants in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.
} Bond.

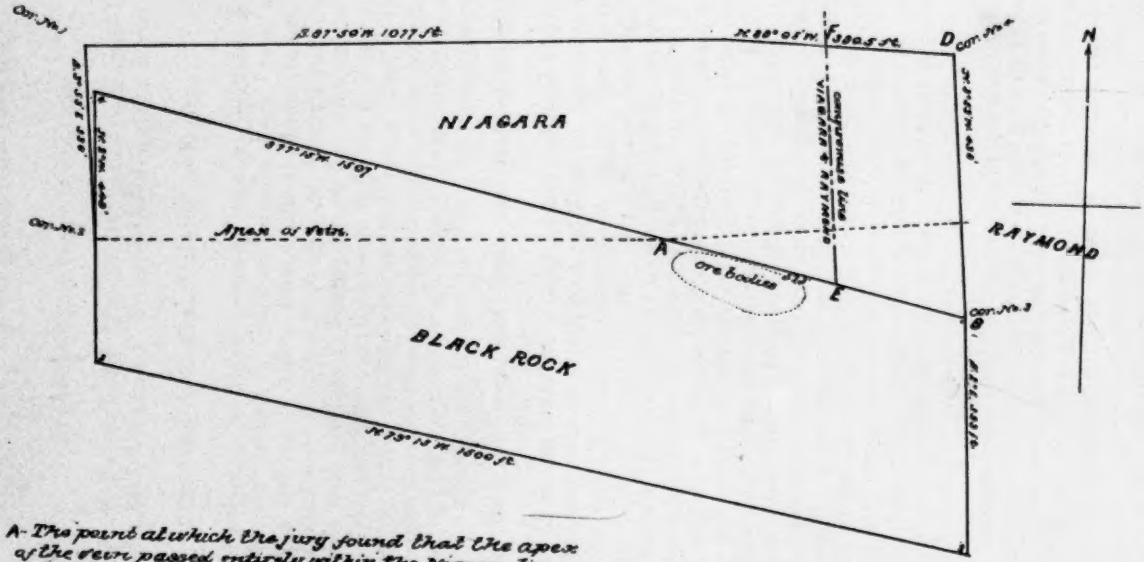
Know all men by these presents that we, William A. Clark, as principal, and Joseph K. Clark and James Ross Clark, as sureties, all of the county of Silver Bow, State of Montana, are held and firmly bound unto William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis in the full and just sum of fifty thousand dollars, to be paid to the said William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, their heirs, assigns, executors, administrators, or attorneys; to which payment, well and truly to be made, we bond ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th of December, A. D. 1895.

Whereas lately, at a term of the supreme court of *of* the
0135 State of Montana, in a suit pending in said court between the said William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis, plaintiffs and defendants in error above named, and William A. Clark, plaintiff in error *was* defendant, there was rendered on the 11th day of November, A. D. 1895, a final judgment in favor of the said plaintiffs in said action and against the defendant therein, the plaintiff in error herein, for more than five thousand doolars, to wit, the sum of $33,781.57, besides costs and interest from said date, and said defendant therein having sued out a writ of error from the Supreme Court of the United States to reverse the said judgment and lodged a copy of said writ in the clerk's office of the supreme co8rt of the State of Montana for inspection, and a citation directed to the said plaintiffs in said action, citing them and admonishing them to be and appear at a Supreme Court of the United States, holden at Washington, on the first Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea and shall pay or cause to be paid such sum as may be
0136 awarded against him by reason of the suing out of said writ

Fig. 1.



A- The point at which the jury found that the apex of the vein passed entirely within the Niagara lines.

Black v. Tupper et al. } p. 0137 a

of error, then the above obligation to be void; otherwise to remain in full force and virtue.

WILLIAM A. CLARK.
JOSEPH K. CLARK.
JAMES ROSS CLARK.

Signed in the presence of—
ARTHUR H. WETHEY.

Sufficiency of sureities and bond.
Approved December 20th, 1895.

WILLIAM Y. PEMBERTON,
Chief Justice of Montana.

0137 STATE OF MONTANA:

In the Supreme Court, October Term, 1895.

WILLIAM FITZGERALD *et al.*, Plaintiffs and Respondents,
vs.
WILLIAM A. CLARK *et al.*, Defendants and Appellants. } No. 529.

Submitted October 4th, 1895. Decided November 11th, 1895.

Statement of the Case by the Justice Delivering the Opinion.

The respondents own an undivided two-thirds interest in the Niagar- Quartz Lode mining claim. The defendant William A. Clark owns the other one-third in said claim. The appellants own the Black Rock Quartz Lode mining claim. The surface relations of the two mining claims are indicated upon the annexed diagram, marked "figure 1."

(Here follows diagram marked p. 0137*a*.)

It will be more convenient in this statement and in the opinion to sometimes speak of the parties to this appeal as the
0138 "Black Rock" and the "Niagara" instead of using their names or the terms "appellants" and "respondents."

The north side line of the Black Rock claim is the south side line of the Niagara claim. We do not purport to exactly indicate on the diagram the position of the apex of the vein as it traverses the two claims. The dotted line simply indicates the general course of the vein, and as far as the purposes of this decision are concerned is correct. The apex moves across the Black Rock claim from west to east and crosses the boundary lines between the two claims at a point marked A on the diagram, which is, as the jury found, 513 feet westerly from the northeast corner of the Black Rock, which corner is marked B on the diagram. The east end line of the Niagara was originally at the place marked B D. In some controversy between the Niagara and the Raymond claim to the east a compromise was made by which the boundary between those two claims was placed at a point about 224 feet westerly from the

original Niagara east end line. This was called the "compromise line," and would be at about the place as marked on the diagram E F. This, however, is not important in the present suit. The parallelism of the end lines of the Niagara was not disturbed by the Raymond compromise. The apex and strike of
0139 the vein, having crossed into the Niagara ground at the point marked A, continue easterly and pass wholly out of the Niagara ground through the easterly end line thereof. It is immaterial whether that end line is the line B D or E F. The strike and apex pass through each of them. The vein dips to the south. The portion of the apex which is represented by the line A G is wholly within the Niagara surface lines. The portion of the vein below this part of the apex in its downward course into the earth—that is to say, on its dip to the south—passes under the line H B, which is the north side line of the Black Rock and the south side line of the Niagara. We call this line a side line at present simply for convenience and not as a prestatement of our views as to whether it must be considered a side line or an end line. On this portion of the vein on the dip lying under the apex A G the ore was found (marked on the diagram "Ore bodies") which was the subject of this action. The defendant the Black Rock owner entered upon this portion of the vein and extracted the ore from the place as marked on the diagram. There was a contention in the case that these ore bodies were upon a vein other than that which
0140 apexed (if we may invent this verb) at A G—that is to say, upon another vein, the apex of which was on the Black Rock ground. But the findings were adverse to the Black Rock in this matter. We will not review that contention. For the purposes of this decision, the ore bodies in question were upon the vein the apex of which is indicated by the line A G, which lies wholly within the Niagara surface lines. The plaintiffs, being the owners of an undivided two-thirds interest in the Niagara, brought this action against the defendants to recover the two-thirds value of the ores so taken from the place above described. Plaintiffs obtained judgment for $27,242.54. The jury also found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode at the point marked A. Judgment was to this effect, as well as for the amount of money named above. A motion for a new trial was denied. The Black Rock people appeal from the judgment and from the order denying the new trial.

Geo. Haldorn, Robinson & Stapleton, and Smith and Word, for appellants.
John F. Forbis, for respondents.

De Witt, *J.* (after stating the facts):

This case was tried in the district court after the decision
0141 of King *v.* Amy & Silversmith Min. Co., 9 Mont., 543; 24 Pac., 200, and before the reversal of that decision on appeal to the United States Supreme Court (152 U. S., 222; 14 Sup. Ct., 510). The case was tried upon the assumption that the law as attempted

to be declared in 9 Mont. was correct. The district court instructed the jury upon this theory, and the judgment gave to the Niagara people the two-thirds value of the ore taken by the Black Rock east of the point where the apex of the vein passed entirely into the Niagara ground, namely, point A on the diagram. No exceptions to these instructions were preserved or specified so that they can now be reviewed; but since the trial of the case at bar and perfecting the appeal to this court the United States Supreme Court has reversed our decision in the Amy & Silversmith case. The Black Rock people argue that, although they are not now in a position to urge error in the instructions (that is to say, that which they now claim to be error by reason of the United States Supreme Court decision of the Amy & Silversmith case), still they can raise the same point upon the ground that the pleadings do not support the judgment. Their argument to this effect is that the pleadings, alleging the facts as detailed in the statement above, do not warrant the judgment under the law as decided by the United States Supreme Court in the Amy & Silversmith case.

0142 In other words, the Black Rock contends that under that decision, if the Niagara apex leaves the Niagara claim through a side line, as it does, the Niagera is limited, in following down the dip of the vein, to a perpendicular plane drawn downward through that side line—the line H B on the diagram—whereas the district court did not so limit them, but held in its judgment that the Niagara could take the ore on the dip of the vein under the apex A G and east of the point A, although such vein on its dip extended southward under the Black Rock north side line—that is to say, the district court gave judgment in accordance with the law of the Amy-Silversmith case in 9 Mont. and 24 Pac., which was declared not to be the law in the Amy-Silversmith case in 152 U. S. and 14 Sup. Ct. We will concede to the Black Rock that this question is raised by the pleadings, and we shall proceed to determine whether the Niagara or the Black Rock owns the ore in dispute taken from the place, marked "Ore bodies" on the diagram.

We shall not renew the discussion of the cases upon this question decided by the United States Supreme Court prior to May 21st, 1890, the date of our decision of the Amy-Silversmith case. Our

0143 best construction of those decisions is found in our opinion in that case. We there met the problem which had for years engaged the earnest attention of lawyers who had to do with mining litigation—*i. e.*, the preservation of the intent of the mining statutes when they are applied to a location *location* in which exploration has demonstrated that the apex and strike of the vein do not pass through both end lines of the location. We gave our best endeavor and research in that decision, and arrived at a result which we were willing to concede was not wholly in accord with the decisions of the United States Supreme Court upon that subject, but which we believed could, with a very little effort, be reconciled with those decisions, and which we were wholly satisfied was the only practicable working solution of the problem in all its phases, and which we were also wholly satisfied was fully within the intent of the United

States mining laws. Even with the profound respect which we in common with all courts entertain for the decisions of the United States Supreme Court, we think that there is no impropriety in saying, and that it is due to ourselves to say, that the longer we observe the daily operation of the mining laws in practical affairs
0144 the more satisfied are we that our decision of the Amy-Silversmith case was correct. We are strengthened in this opinion by the views of other courts, to which we shall hereinafter refer. But the United States Supreme Court is the court of last resort upon this subject, and our opinions, as a rule of decision, must be abandoned if they are in conflict with the declarations of the superior tribunal. If that court had given no further utterance upon this subject since its decision of the Amy-Silversmith case, we should feel that we must, however reluctantly, desert the principle which we sought to maintain in that case; but, as will be seen in the review of the cases below, that distinguished tribunal has given a hint that it is willing to reconsider the principle involved. Upon that hint we feel that we are justified in approaching the subject much as if it were *res integra* and without subjecting ourselves to the criticism of judicial insubordination.

But to the subject in hand. As noted above, we shall not go to the decisions back of our Amy-Silversmith opinion. 9 Mont., 543; 24 Pac., 200. We are satisfied with that discussion of the subject and the review of the authorities up to that date. We shall take up the subject as it has been developed since our decision in that case. The history of the discussion is found, chronologically, in the
0145 following cases: King *v.* Amy-Silversmith Min. Co. (May 21, 1890), 9 Mont., 543; 24 Pac., 200; Tyler Mining Co. *v.* Sweeney (Jan. 16th, 1893), 4 C. C. A., 329; 54 Fed., 284; King *v.* Amy-Silversmith Min. Co. (March 5th, 1894), 152 U. S., 222; 14 Sup. Ct., 510; Last Chance Min. Co. *v.* Tyler Min. Co. (April 9, 1894), 9 C. C. A., 613; 61 Fed., 557; Con. Wy. G. M. Co. *vs.* Champion M. C., 63 Fed., 540, Aug. 13, 1894; Del Monte Mining & Milling Co. *v.* New York & L. C. Min. Co. (March 13, 1895), 66 Fed., 212; Last Chance Min. Co. *v.* Tyler Min. Co. (April 15th, 1895), 157 U. S., 683; 15 Sup. Ct., 733. The cases cited above in 4 C. C. A., 54 Fed., 9 C. C. A., 61 Fed., and 157 U. S., 15 Sup. Ct., are different appeals and discussions of the same case. In the Amy-Silversmith case the apex of the vein crossed the claim as indicated in the diagram used in that opinion, and which is reproduced here, marked "figure 2."

(Here follows diagram marked p. 0145*a*.)

The vein dipped to the north. We held that the right of the Amy-Silversmith to follow the vein on the dip was bounded by a perpendicular plane extending into the earth at the point where the apex crossed the Amy-Silversmith north side line, the point marked *e* on the diagram, Fig. 2, and which plane was parallel to the end lines of the Amy-Silversmith claim and extending north of the Amy-Silversmith north side line.

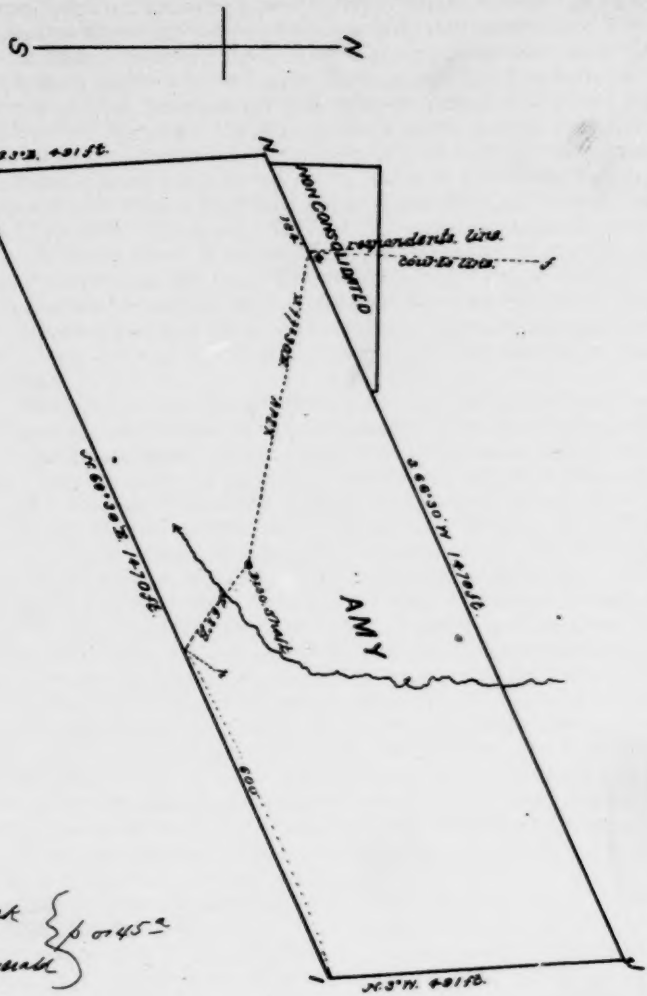


Fig. 2

Clark
v.
Fitzgerald
} p. 0145a

0146 We quoted section 2322, Rev. St. U. S., which is as follows: "The locators of all mining locations shall have the exclusive right of possession and enjoyment of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." We then said: "As said by Mr. Justice Field (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 206; 6 Sup. Ct., 1177), 'This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein.'

0147 We may add to these words that further difficulties arise when we are obliged to apply this statute to facts not wholly within its contemplation. If a mining location be made regularly—made so that the strike of the vein crosses the location from end line to end line and at right angles to said end lines—there is nothing in the statute to construe or interpret. Mining Co. *v.* Tarbet, 98 U. S., 469; Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 205; 6 Sup. Ct., 1177; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 485; 7 Sup. Ct., 1356. 'There is no patent or latent ambiguity.' But when veins or their strikes cross the side lines and a side line and end line at all conceivable angles difficulties confront the courts that can best be met by legislative aid. Until such aid is invoked the courts must follow the statute and previous construction as closely as the varying facts will permit. Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 208; 6 Sup. Ct., 1177. The history of mining has proven that the law of May 10, 1872, and amendments thereto do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar

0148 is a notable instance. It is a first impression in this court and all other appellate courts." After stating what we understood to be the meaning of the words "dip," "s-rike," etc., as used by miners and in the decisions, we further said: "The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries or which lies within perpendicular planes drawn downward indefinitely on the lines of these boundaries. The miner may follow the dip wherever it goes, provided he has the apex as the basis of operation, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the

vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location and of a depth as far as he desires or is able to work downward, and at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 205; 6 Sup. Ct., 1177." We have always been of opinion that this is the keynote of the interpretation of section 2322, Rev. St. U. S.—that is to say, if the miner has the apex in his location he is to have the vein,
0149 and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within its surface lines, whether that apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. This, in our opinion, is what section 2322 says in plain language.

Continuing further in the Amy-Silversmith case, we said: "It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all and only that portion of the solid contents of the earth included in a parallelopipedon formed by dropping vertical planes downward on the line of each side of such parallelogram, and the intent of the statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelopipedon indicated. Therefore, if the miner locates his claim regularly—that is, as the statute contemplates that he
0150 will—he has all that the statute intends to give him. See cases cited *supra*. If he will not or cannot make the explorations necessary or ascertain the true course of the vein and draws his end lines ignorantly, he must bear the consequences (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., 118 U. S., 207; 6 Sup. Ct., 1177—that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip." We are still of opinion that the loss which a miner should suffer, if he is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, should be the loss of so much length of the vein on the strike as by his irregular location he has failed to observe the length on the apex. If this be the consequence which he is to suffer by reason of his irregular location, he loses simply that which he failed to locate, and he does not lose the vein of which he has located the apex. That he is to have the vein when he has the apex, we believe is the intent of the mining law. Rev. St. U. S., 2322. We said further in the Amy-Silversmith case: "But in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will
0151 locate so that the strike shall pass through the middle of each

end line, leaving 300 feet of surface on each side of the vein, but the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days under our statute to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of opinion that the statute should be so construed as will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward." We then proceeded to review the contentions of counsel in the case and to discuss, as we understood them, the three leading cases in the United States Supreme Court, namely, Mining Co. *v.* Tarbet (the Flagstaff case), 98 U. S., 463; Iron Silver Mining Co. *v.* Elgin Mining & Smelting Co. (the Horseshoe case), 118 U. S., 196; 6 Sup. Ct., 1177; Argenting Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356.

0152 We then offered the following solution of the problem and decided the case upon the principle as found on page 575 of 9 Mont. and page 200, 24 Pac., as follows: "These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mold into which they were forced; but we believe that we may legitimately conclude from those cases that in the facts now before us the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth; but the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip in that portion lies under the apex of the Non-consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip and so operate at the point where the strike is ended.

0153 If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends—that is, at a point on the side line (point *e*, Fig. 2), and if it takes effect there its parallelism must not be destroyed.

We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east side line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent develop-

ments. The parallelism of the end-line planes is fixed by location and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluable upon this theory. The intent of the statute seems to be secured." As noted in the
0154 Amy-Silversmith case, the difficulties arise is applying the United States mining statutes to accidentally irregular locations—that is, locations where it is developed in time and by explorations that the apex and strike pass through the side lines or a side line and an end line (as in the case at bar), or enter and pass out of the same side line. We essyaed in that case a solution of this difficulty which could be applied to every irregularity and which would secure absolute uniformity in all complications and give to every mining location, as the statute intended and declared, the whole vein, in its whole depth, to the extent of the length of the apex which was located. We thought that we had accomplished that result. With due deference to those who have differed from us, we think so still.

The principle which we sought to maintain in the Amy-Silversmith case found its first approval in an appellate court in Mining Co. *v.* Sweeney, 4 C. C. A., 329; 54 Fed., 284. In that case the United States circuit court of appeals, ninth circuit, discussed the extralateral rights of a location where the apex and strike passed through a side line and an end line. The situation differed from that of the Amy-Silversmith case, as in that case the apex
0155 and strike passed through both side lines. But we understand that the circuit court of appeals approved the principle of our decision in the Amy Silversmith case, for the opinion by Judge Hawly, a veteran lawyer and judge in the mining regions, says: "Here the location of the Tyler was properly made in the form of a parallelogram along the course of the lode or vein. The road extends from the northwesterly end line for a distance of nearlt 1,100 feet within the side lines of the surface location, and then so changes its course as to cross the southerly side line into the Last Chance location. The learned justice who wrote the opinion in the Horseshoe case (Iron Silver Min. Co. *v.* Elgin Mining & Smelting Co., *supra*), when he said that the parallelism of the end lines 'is essential to the existance of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that the lode should extend in its length from one end line to the other of the location. If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler, near the point where in fact it crossed the line, there could certainly be no question as to
0156 the right of the Tyler to follow the lode or vein in its downward course for its entire depth our side of the vertical planes drawn through the side lines. The fact that it continued its course and crossed the side lines does not in any manner change its prin-

ciple. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice, and authority, it seems to us is the only reasonable construction that can be given to the statute. Whenever and in whatever manner this point has been presented by any similar facts, the rulings of the courts have been substantially in accordance with the views we have expressed. Golden Fleece G. & S. M. Co. *v.* Cable Consol. G. & S. M. Co., 12 Nev., 313; Doe *v.* Sanger, 83 Cal., 203; 23 Pac., 365; Kahn *v.* Mining Co., 2 Utah, 174; King *v.* Amy-Silversmith Min. Co., 9 Mont., 543; 24 Pac., 200. In the case last cited the lode crossed the surface lines without reaching either end line as marked on the surface, and the court held that, where a lode or vein crosses the side line of a location,
0157 the strike is determined by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane parallel to the end lines drawn downward, and which takes effect at a point where the apex intersects the side line. The court, in its opinion, after reviewing the Flagstaff case, 98 U. S., 463; the Argentine case, 122 U. S., 478; 7 Sup. Ct., 1356, and the Horseshoe case, 118 U. S., 208; 6 Sup. Ct., 1177, and pointing out the differences existing between them and the Amy case, and stating the various contentions of counsel, said: * * *" The opinion of Judge Hawley then quotes the Amy and Silversmith case (9 Mont. and 24 Pac.) as to the principle therein announced. That case went back for trial and appeared again in the circuit court of appeals as The Last Chance Min. Co. *v.* Tyler Min. Co. (April 9, 1894), 9 C. C. A., 613; 61 Fed., 557, and in the opinion the court adhered to the principle of the Amy-Silversmith case. In the meantime the Amy-Silversmith case had been reversed by the United States Supreme Court, March 5, 1894 (152 U. S., 225; 14 Sup. Ct., 510), but that decision is not mentioned in the Last Chance case (9 C. C. A. and 61 Fed.), and does not seem to have been considered by the circuit court of appeals. That court
0158 said: "The right of each party to follow the lode on its strike or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler and Last Chance locations, but each company would have the right to follow the lode the top or apex of which is within its surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the lode ended—that is, at the point where the lode in its lengthwise course intersects the side lines of the claims. The Tyler would be entitled to all that portion of the lode that lies westerly of such vertical line drawn downward, and the Last Chance would be entitled to all that portion of the lode easterly of said line." See, also, Con. Wy. G. M. Co. *vs.* Champion M. Co., 61 Fed., 540.

As the United States Amy-Silversmith decision was not men-

tioned in 9 C. C. A. and 61 Fed., although preceeding it in time, we may treat the United States decision as being subsequent. In that case, after stating the facts and the contentions, the United States Supreme Court said: "Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and also the exclusive right of possession and enjoyment of all
0159 veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extending downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines extended downward vertically, therefore, determine the extent of the claim, except when in its descent the vein passes outside of them and the outside portions are to lie between vertical planes drawn downward through the end lines. The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim the lines marked as side lines cross the course of the strike of the vein and do not run parallel with it. They therefore constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and
0160 which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments, but, as was said in this court in Iron Silver Min. Co. *v.* Elgin Mining and Smelting Co., 118 U. S. 196; 207 S. Sup. Ct., 1177, 'if the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein and draws his end lines ignorantly, he must bear the consequences.' The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are, in fact, end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law. Acting upon this principle, there is no lateral right to the holder of the Amy claim by which he can follow its vein into
0161 the Non-consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made 'to ascertain, as near as possible, the

course and direction of the vein. * * * Even then,' the court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein; but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location then that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine-workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in the titles to mining claims.' Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owners right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side line of its claim
0162 as that side line, so called, was, in fact, one of its end lines."

We understand that the United States Supreme Court not only reversed our judgment, but discarded as untenable the principle upon which we pronounced it. This decision was received with regret, not only by the bench and bar in the mining regions, but by both practical and scientific miners. This regret was greater in that the decision emanated from, as we said in the Amy-Silversmith case, "Mr. Justice Field, the judicial father of the mining law in the United States," a jurist who has illuminated this topic of the law by not only his profound learning, but by his practical experience in mining affairs. As an indication of the reluctance with which courts inferior to that of the United States Supreme Court have accepted the reversal of the principle of the AmySilver-smith case, we notice the case of Del Monte Mining and Milling Co. *v.* New York & L. C. Min. Co. (Cir. Ct., D. Colo., March 13, 1895), 66 Fed., 212. In that case the court had before it the conditions of an apex and strike passing through an end line and side line. Judge Hallett, district judge, to whom courts and councel in the mining regions are greatly indebted for his learning, which has been applied to this class of litigation, said: "If the strike of the lode in the
0163 New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the Supreme Court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and if this proposition be accepted the south end line and east side line, intersected by the outcrop of this lode, are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of law in the Supreme Court or in any court, so far as we are advised. It is true that in

the Flagstaff case, 98 U. S., 463, and recently in the Amy and Silversmith case, 152 U. S., 223; 14 Sup. Ct., 510, the Supreme Court declared that the side lines of a location shall be end lines whenever the lode on its strike crosses such lines; but these decisions
0164 do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location and within its side lines a distance of 1,070 feet. It is conseded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstances that the location extends in a north-ly direction about 280 feet beyond the point where the lode diverges from the side lines. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere because the court cannot make a new location or in any way change that made by the parties. Iron Silver Min. Co. *v.* Elgin Mining and Smelting Co., 118 U. S., 196; 6 Su*t*. Ct., 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recog-
0164½ nized without drawing any line, and if there be magic in the word 'line' it will be better not to use it. In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the south end line procured. In this proceeding there is no departure from the end lines of the New York location as fixed by the relator and there is no new line of location drawn for any purpose whatever. We keep entirely within the end line of the location, as required by the statute, and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of 1,000 feet (which is not an extraordinary occur-*ance*) a location shall be made of the length of 1,500 feet, extending 250 feet in each direction beyond the ends of the lode, would any one deny the right of the locator to follow the lode within his
0165 end lines upon the ground that the lode did not cone to either of such lines? I think not. The case is not different when the lode intersects one end line and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining territory so far as he may within his end lines and so far as he holds the

outcrop in his location. Upon this construction of the statute respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location." It is also true that in Judge Hallett's case the facts differ from the Amy and Silversmith in that the apex crossed a side line and an end line instead of two side lines, as in the Amy-Silversmith case. But Judge Hallett applied the principle of the Amy-Silversmith and he so applied it after, as we understand, the United States Supreme Court had repudiated it.

One month after Judge Hallett's decision—that is, on April 15, 1895—appeared the decision in the United States Supreme Court in Last Chance Min. Co. *v.* Tyler Min. Co., the case which
0166 we have formerly encountered in 54 Fed., 4 C. C. A., and 61 Fed., 9 C. C. A. See 157 U. S., 683; 15 Sup. Ct., 733. The case was decided in the United States Supreme Court without it being necessary to treat the question of the apex and strike passing through an end line and a side line; but as to this matter the court said: "Our conclusions in this respect obviate the necessity for considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end lines. Of course if the latter is a valid location the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line; but if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extending downward? It has been held by this court in the cases heretofore cited that where the course of a vein is across instead of lengthwise of the location the side lines become the end lines and the end the side lines; but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a
0167 side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to persue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines? If the common-law rule as to real estate obtains in such a case, then of course on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any of its boundary lines; and even if the amended application is perfectly valid the question would arise whether the rights acquired under it related back to the date of the original location or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question it is unnecessary to consider this." Mr. Justice Brewer

wrote the opinion. There was no dissent. We assume that Mr. Justice Field concurred. The fact that the United States Supreme Court said in this case (with the justice concurring who wrote
0168 the Amy-Silversmith decision) that it had never given any decision as to what extralateral rights exist if a vein enters at an end line and passes out at a side line we think is a sufficient warrant to us to reopen the discussion as to what principle of decision should apply in these irregular locations.

We can see but two solutions of the difficulty presented in this case: One is to say that when the apex and strike cross a located side line that such side line becomes an end line, in accordance with what we understand to be the decision in the Flagstaff case and in the Amy-Silversmith case in the United States Supreme Court. The other is to apply the Amy-Silversmith doctrine as announced — 9 Mont.; 24 Pac. We will examine what seems to us to be the legitimate results of the first proposition. Turning again to the diagram, figure 1, the located east end line of the Niagara claim must still remain an end line. It was located as such, if that means anything, and the apex and strike pass through it, which fact, under any view, means everything; so this line is and must remain an end line. Then we have the south side line of the Niagara; also an end line, because the apex and strike pass through it. So we have two end lines not parallel to each other, but at
0169 an angle to each other not far from a right angle; but the end lines must be parallel. The result is that the Niagara cannot follow its dip at all; but the statute says it may follow the dip. These difficulties do not come to us at all as a surprise. We clearly foresaw them, and pointed them out in the Amy-Silversmith case. 9 Mont., 571; 24 Pac., 200. Thus we find that the Niagara claim, under these views, must be relegated to the common law. It owns downward inside of the perpendicular planes of its surface lines. But this result is not the intent of the law (sec. 2322, R. S. U. S.). The intent is that the locator shall have the right to the vein throughout its entire depth if the apex lies within its surface lines, although the vein on its dip downward departs from the perpendicular, so as to extend outside of the side line. By calling this side line an end line the whole intent of the statute is destroyed and we go back to the system of the Spanish law (9 Mont., 567; 24 Pac., 200), which was deserted in the adoption by Congress of the American mining laws. For example, again, in this case reverse the direction of the dip and assume that it goes north, then the Niagara people would take all of the vein between the downward claims of the end line and side lines, the lines E F and E H on the diagram. They would get a fan-shaped section of the vein, rapidly increasing in size with every foot downward—that is to say, such would be the result unless we adhere to the common-law rule and have no extralateral rights at all. The plain fact is that to call the side line an end line in this case
0170 leads us into consequences that totally upset the whole intent of the law. We cannot subscribe to any such doctrine. These contemplations are not at all new to us. We pointed out

these difficulties and absurdities in the Amy-Silversmith case, and we then hoped that they would not again threaten the disturbance of the rights intended to be given by the mining statutes. We feel now, as we did in the Amy-Silversmith case, that we are not able to take the responsibility of any such destructive construction. And why, indeed, should a located side line be converted into an end line by a court? The locator never so intended it. He made the side line the long line, 1,500 feet in length, intending it to be generally parallel to the vein. The law never intended that such a side line should be an end line. If the side line is to become an end line and the end line a side line, then the court, working this readjustment of the lines, puts the side lines at a distance from the center of the lode much greater than 300 feet. What would be done with those lines and this extra service taken in by them? Shall they be left so that they will include 1,000 or 1,500 feet in width when the law intended the locator should have 600 feet only,
0171 or will these judicially created side lines be drawn in, and thereby new side lines made by the court? But "the court cannot become the locator for a mining claimant." Amy-Silversmith case, 152 U. S., 228; 14 Sup. Ct., 510. The further we follow this doctrine into its details the more untenable it appears. We shall abandon its pursuit and leave its reconciliation to reason, law, an- the intent of the statute and practical application to others, who may be more skillful in making a reasonable construction.

As we leave this confusion and turn to the other solution—that of the Amy-Silversmith case, 9 Mont. and 24—difficulties disappear and there is light upon the whole path. We can, then, do as the United States Supreme Court said in the decision in the Amy-Silversmith case, on page 228, 152 U. S., and page 510 14 Sup. Ct.: "The most that the court can do where the lines are drawn inaccurately and irregularly is to give to the miner such rights as his imperfect location warrants under the statutes." That is to say, we can give to the miner, or rather the law as we construe it gives to the miner, as much length of strike, no matter how deep he goes upon the dip, as he has length of apex, and he loses in strike and dip only what he has failed to get in apex. That is what the district court in this
0172 case following the Amy-Silversmith case, 9 Mont., 543; 24 Pac., 200, accomplished. It gave to the Niagara the ore on the dip east of the point where the apex and strike crossed the south side line of the Niagara. This is what the circuit court of appeals did in Tyler Mining Co. *v.* Sweeney, 4 C. C. A., 329; 54 Fed., 284, and Last Chance Min. Co. *v.* Tyler Min. Co., 9 C. C. A., 613; 61 Fed. 557. This is what the circuit court of the district of Colorado did in the Del Monte Min. Co. *v.* New York & L. C. Min. Co., 66 Fed., 212. This is what we understand the United States Supreme Court suggested in Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S., 683; 15 Sup. Ct,, 733, that it might do. The language of Judge Hawley and Judge Hallett in those decisions is very apt when they suggest that if the apex and strike broke off abruptly at the side line would any one contend that the dip could not be followed within the end lines? And why should it not also, as well, be followed if the strike

instead of physical- ceasing to exist at all simply cease to further exist within the Niagara lines? We can think of no good reason which would allow the owner to follow the vein on the dip in the supposititious cases and deny him that right in the actual
0173 case. In the Amy-Silversmith case we spoke of the end-line plane taking effect at the point where the strike, in fact, ended. By this ure of the words "end line" perhaps we give opportunity for the contention that we were moving an end line and locating it at a place other than that fixed by the locator. We endeavored to make it clear that we were not moving an end line, but we were simply giving it effect at the only point where it could operate. But, as Judge Hallett says, if there is any magic in the word "line" we will not use that word. Perhaps we can more effectively describe the principle for which we contend as follows: Put one side of a square on the located east end line of the Niagara (the line B D, Fi*b*. 1) and let the other end of the square be long enough to reach the point where the strike and apex leave the Niagara ground (point A, diagram); then run this square up and down the line east end line (line D B, diagram) and that line extended south and run the square all over the perpendicular plane of this line, then the successive points which the long end of the square reaches will be the points beyond which to the west the Niagara people may not follow the vein on the dip, and beyond which to the east the Black Rock people may not come. Thus the Niagara is
0174 keeping upon the dip of the vein within its end lines and it is not following the strike of the vein outside of any line. The principle might also be further illustrated by imagining a pair of draftsman's parallel rulers. One ruler is placed on the east end line of the Niagara (the line B D). Its parallel is pushed out to the point where the apex crosses the side line (the point A) and set. The plane dropped perpendicularly from the westerly ruler would form the boundary between the Niagara and the Black Rock on the dip of the vein.

Of course, we understand the difference between the doctrine of the United States Supreme Court, which commences with the Flagstaff case and receives its last treatment in the Amy Silversmith case, and our theory which we held in the Amy Silversmith case. The Supreme Court doctrine seems to be that the side lines, which are marked as such on the ground, namely, the 1,500-feet lines as the side lines and the 600-feet lines as the end lines, are not in fact the side lines and end lines, but what are the side lines and the end lines is to be determined by the subsequent demonstration of where the apex and strike cross the locator's lines. The trouble with the theory is that it leaves the determination of the boundaries to subsequent development, which may require years, and it calls
0175 that an end line which was never located as such and it makes the side lines 600 feet long only, when the statute says they may be 1,500, and makes the end lines 1,500 feet long, when the statute says they shall not be over 600, and it gives a surface of more than 300 feet on each side of the center of the lode. We cannot be persuaded to think that this is the intent of the statute. As we

noted in the Amy-Silversmith case, the difficulties of this construction did not fully appear in the Flagstaff and Argentine cases, where, as we understand, the strike and apex of the vein were practically at right angles to the length of the location. 9 Mont., 574; 24 Pac., 200. But the theory meets great difficulty when applied to veins which have a general course lengthwise of the location and which happen to slip out of the location by a side line before the end line is reached.

Again, we fully understand that the situation in the case at bar and the Tyler case and the Del Monte case differs slightly from that of the Amy-Silversmith case. In the Amy-Silversmith the vein passed through two side lines. In the case at bar and the other cases it passes through a side line and an end line; but we contend that the same reasoning applied to both situations—that is,
0176 that the miner shall have as much vein in length on the strike, at all depths to which he may go on the dip, as he has length of apex within his surface lines. We cannot too strongly emphasize our opinion, even at the expense of tiresome reitteration, that this is the intent of section 2322, Rev. St. U. S., and the true interpretation of the decisions thereunder. We believe that this doctrine should be applied to both situations. On the other hand, if the other doctrine is to be applied to one situation, why not to both? For it does not seem to us consistent to say that the dip of the Amy-Silversmith must be cut off at their north side line, and that the Niagara may go beyond their south side line, simply because the Niagara vein, on its eastward course on the strike, goes out through an end line instead of a side line; but when we undertake to apply the United States Flagstaff and Amy-Silversmith doctrine to the case at bar we find that the Niagara cannot follow its dip out of any of its lines, and it is cut down to the common-law rule of "*ad coelum et ad orcum.*" What we contend for is a uniform construction of the law; a construction which will give the vein on the dip to every locator who has the apex in his location, and not give it to one who has the apex and withhold it from another who
0177 as fully has the apex; that shall give it to the Amy-Silversmith and the Niagara as well. Let us do this, and make estates in mines uniform under the law. This seems to us more reasonable than to apply a construction which will give to one locator the estate which the law contemplates and deny it to another.

The United States Supreme Court, in Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S., 683; 15 Sup. Ct., 733, observing the possibility or probability of being at some time obliged to apply its Flagstaff and Amy-Silversmith rule to the situation of a vein passing through a side line and an end line, seemed to shrink from the consequences of the doctrine (consequences which we pointed out in our opinion in the Amy-Silversmith case, 9 Mont., at page 571; 24 Pac., 200), and stated that they had never decided what extralateral rights existed in such a situation. They also said: "May the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may

go, within the limits of some equitably created end lines?" We propose now just such an equitable doctrine, the same one that we proposed in the Amy-Silversmith case, and one wholly within the intent of section 2322, Rev. St. U. S. We have hereinbefore, and especially in the Amy-Silversmith case, given the reasons for our belief that such a doctrine can, by
0178 a slight effort, be reconciled with the former decisions of the United States Supreme court, and that, as Judge Hawley said in the Tyler case, 4 C. C. A., 329; 54 Fed., 292, "this, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute." We now feel at liberty to follow our convictions and our belief that our view of the law is correct, by reason of the indication given by the United States Supreme Court (157 U. S., 695; 15 Sup. Ct., 733) that they are willing to reconsider (or, as the court puts it, consider) this important principle in the construction of section 2322, Rev. St. U. S. We shall accordingly adhere to the principle of our Amy-Silversmith decision and hold in this case that the judgment of the district court was within the law when it gave to the Niagara people the ore found in the dip of the Niagara vein south of their south side line and east of the point where the apex and strike of the Niagara vein crossed the bounding side line between the Niagara and the Black Rock.

The appellants also rely upon some alleged errors in the instructions. It is contended by respondents that the errors in the instructions are not properly excepted to. Respondents cite
0179 cases from this court upon that subject; but we think the proper contention should have been as to whether the errors were specified on the motion for new trial. We are not satisfied that the specification was insufficient. We shall not, however, pass upon that question, as it has not been clearly or fully argued, and the question of practice is a delicate and troublesome one, but will proceed to an examination of the instructions. Our doing so cannot be a matter of complaint to the respondents, for our examination of the instructions has satisfied us that there is no error therein. We will briefly review them. Appellants complain that the court instructed the jury in reference to following a vein on its dip beneath the surface, but did not in this instruction inform the jury as to the matter of the parallel end lines. If the appellants mean that the court did not instruct as to the parallelism of the end lines as located, it is sufficient to reply that no contention was made upon this point. The parallelism of the located end lines is conceded, and the court, having adopted the Amy-Silversmith doctrine of this court, proceeded, of course, upon the theory that the original end lines continued to be the end lines.

0180 The Black Rock people contended upon the trial that the "ore bodies" in question were upon a vein the apex of which was wholly within the Black Rock ground. This was called the "Stoner vein." The apex of the Stoner vein, it appears, was on the Black Rock ground. One of the great contentions of fact in the case was that the Stoner vein, from its apex down to the ore bodies,

was a continuous vein. Upon this contention, as noted in the statement of the case, the Black Rock failed. It seems to have been established by the decision that the Stoner vein was not continuous to the "ore bodies." In instructing the jury upon this contention, the court gave them the following: "If you find from the evidence that what has been called in the evidence the 'Stoner vein' is a separate and distinct vein from what is called the 'Niagara vein,' and that the apex of said Stoner vein is inside the boundaries of the Black Rock claim, and also find that said Stoner vein connects with said Niagara vein at some point below the surface of the ground, and that such connection is made by following a continuous streak or body of quartz or ore, or by passing through vein-matter as devined in these instructions, *or by following such material or indications as a practical miner would follow with the*
0181 *expectations of finding ore*, then in such case defendants are entitled to and are the owners of all quartz, ore, and mineral-bearing rock contained in such vein below the said point of intersection, and plaintiff cannot recover therefor, it being conceded that the Black Rock Lode vein owned by defendants is older and was located and patented prior to the time when the Niagara claim was located or patented." This instruction, as we have just quoted it, was that submitted. The court, in giving it, struck out the portion which is in italics. Appellants complain of error in striking out that portion. We think in this the court was correct. The question is a geological one—that is, whether the Stoner vein in its downward course connected with the Niagara—and the court instructed how such connection would be made—that is, by following a continuous streak or body of quartz or ore or by passing through vein matter as defined in the instructions. This was a question of geology and of facts in nature. It would have *have* left it to the jury entirely too indefinitely to have told them that they could find a continuous body of ore by following such indications as a practical miner would follow with the expectation of finding ore. We do not think that this is the method by which geological facts can be established. The application of such
0182 language as this, which was stricken out of the instructions, must not be confused with the use of similar language in reference to finding ore sufficient to support a location of a mine. When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work (Shreve *v.* Copper Bell Mining Co., 11 Mont., 309; 28 Pac., 315, and cases therein reviewed), it is a very different question from telling a jury that the geological fact of the continuity of a vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity.

Objection is made to instruction No. 15 in that, as it is contended by counsel, the court assumed that the respondents had established a right to recover. But the court did make this assumption. The instruction opens with the following language: "Plaintiffs having

the burden of proof, they must esta-lish the material allegations of their complaint by a preponderance of evidence."

Another instruction objected to by appellants is as follows: "In estimating the value of the ore extracted from the Niagara
0183 claim you will take as a basis therefor the market value of such ores on the dump of the claim, after deducting the cost of mining and hoisting the same." The objection which appellant makes to this instruction, as he states it in his brief, is that he was not a trespasser and was entitled to his actual expenses in extracting and treating the ore, provided the expenses are reasonable and as low as the work could be done. He cites us to a number of cases involving questions of accounting between cotenants when one tenant has made necessary improvements on premises or has extracted ore therefrom. We are of opinion that the instruction places the appellant upon precisely the ground which he himself claims. The court says that the basis of computation shall be the market value of the ore on the dump after deducting the cost of mining and hoisting the same. By the instruction the appellant is given credit for the cost of mining and hoisting, just as he claims should be. Furthermore, we think that the instruction, by its only reasonable construction, gives the appellant the expense of smelting and reducing the ore. The court says that the basis shall be the market value of the ore on the dump. What is market value? It is certainly that price for which the ore could reasonable be sold on the market. That market value
0184 would in the mind of a buyer be necessarily determined by deducting the cost of reducing the ore—that is to say, if a purchaser compute what he would give for the ore he would figure the value of the same on the dump, and then he would deduct from that value the cost of reducing the ore to bullion, and, having deducted that cost, he would make a bid for the ore, and this would constitute the market value. No one could possibly contend that the market value of crude ore was the value of fine silver in such ore. On the other hand, the market value would be the value of fine silver, less the expense of getting such silver out of the ore. We are satisfied that the instruction was in fact precisely what the appellant claim- it should be.

Appellants object to the refusal of the court to give the following instruction: "The jury are instructed that if they believe from the evidence that the side lines of the Niagara location are practically perpendicular to the vein, then the side lines of said location become the end lines, and the plaintiffs cannot claim the du-p beyond the side lines." But there was no evidence whatever in the case and no contention to support any such instruction. The side lines of the Niagara not only are not practically perpendicular to
0185 the vein, but they are practically not far from parallel to the same. There were no facts in the case to warrant the giving of such an instruction.

Appellants also urge error in the exclusion of certain testimony of a witness, William E. Hall, offered to be introduced. Mr. Hall was a practical miner. He testified to what is known as the "Rain-

bow lode," in the Butte district. He said that it was his opinion that the vein on the Black Rock was a part of or an extension of the Rainbow lode. He had examined the Black Rock mine. He saw a fault in that mine. Appellants then offered to prove by Mr. Hall that he had worked five claims on the Rainbow lode, and that the faults which he had found on the Black Rock are characteristic of the Rainbow vein. The testimony was objected to, the respondents stating that if the appellants intended to prove that this fault in the Black Rock extends to the Alice mine, with which mine Mr. Hall was familiar, they would not object. Appellants stated that they did not intend to prove this. The court sustained the objection, remarking, "If it is for the purpose of attempting to show a condition of affairs here (that is, in the Black Bock) by comparison of what exists in the Alice or in any other ground outside, unless it is
0186 shown that there is a continuity between the conditions which exist there and the conditions found in this ground," the evidence will not be admitted. The objection was sustained. We are of opinion that the learned judge of the district court stated the reasons for excluding the testimony as completely as we could set them forth. The subject under consideration in Mr. Hall's testimony was a fault in the Black Rock vein. One certainly could not prove the existence of a fault in one vein by showing that there were other and disconnected faults in another vein which the witness claimed was a continuity of the vein under consideration without showing any continuity in the fault.

Again, appellants contend that the judgment should be reversed, because the appellants' counsel were not present when the verdict was rendered, and thus had no opportunity to poll the jury. Appellants' counsel had made arrangements with the bailiff that when the jury agreed upon a verdict he, the bailiff, should call counsel. This was a matter wholly out of the court, and had no place in the proceedings of the court. It appears that the jury came in at a time when all the counsel were absent. The bailiff omitted to send for appellants' counsel. The counsel made the bailiff his
0187 agent for this purpose, and if such agent omitted to do that which he agreed to do we are not prepared to reverse this case for that reason. When it is the fact that counsel had the privilege of being in the court, if he wished, when the verdict was received, and his accidental absence at that time was not owing to any order or any action of the court, or any conduct by the counsel or parties on the other side, we shall not reverse this judgment for any such reason.

Another ground set up for the granting of a new trial is the alleged misconduct of Juror Hess. Hess makes an affidavit that he was ill, and that he agreed to the verdict in order to get discharged from service. But this juror never made any complaint to the court of his illness. When the jury came in and rendered its verdict he said nothing to the court, and there was no intimation that he was ill or needed any medical attendance. His alleged illness, and thereby his alleged coersion into the verdict, never appeared until after his discharge and his making an affidavit for the benefit

of the appellants. The case was an equity one, the findings were advisory, and the district court very properly disregarded this juror's affidavit given to impeach his own verdict.
0188–1035 Gordon *v.* Trevarthan, 13 Mont., 387; 34 Pac., 185. It is also attempted to be shown in Juror Hess' affidavit that the bailiff in charge of the jury was guilty of a misconduct. The story that Juror Hess tells about the conduct of the bailiff bears upon its face all the appearances of absurdity. Perhaps the district court would have been perfectly justified in disbelieving Hess' statements in regard to the bailiff without any contradiction, but the affidavit was contradicted in many respects. The district court was perfectly justified in paying no attention to the showing attempted to be made by the Hess affidavit.

Having reviewed all of the questions raised in this case, it is ordered that the judgment and the order denying a new trial be affirmed.

WILLIAM H. DE WITT,
Associate Justice.

We concur.

W. Y. PEMBERTON,
Chief Justice.

WILLIAM H. HUNT,
Associate Justice.

* * * * * * *

1036 In the Supreme Court of Montana.

WILLIAM FITZGERALD *et al.*, Plaintiffs and Respondents,
vs.
WILLIAM A. CLARK *et al.*, Defendant- and Appellant-.

The Answer of the Judges of the Supreme Court of Montana.

The record and proceedings of the complaint, whereof mention is within made, with all things touching the same, we certify, under the seal of our supreme court of the State of Montana, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of Supreme Court of Montana.

1037 In the Supreme Court of Montana.

WILLIAM FITZGERALD *et al.*, Defendant- in Error,
vs.
WILLIAM A. CLARK, Plaintiff in Error.
} Certificate.

UNITED STATES OF AMERICA,
State of Montana, } *ss:*

I, Benjamin Webster, clerk of the supreme court of Montana, do certify *that* the foregoing 1224 pages, from 01 to 0188 and from 1 to

1036, to be a full, true, and correct copy of the record and all the proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of the supreme court of Montana this the 15th day of February, A. D. 1896.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of the Supreme Court of Montana.

1038 In the Supreme Court of the United States.

WILLIAM F. FITZGERALD *et al.*, Defendants in Error,
vs.
WILLIAM A. CLARK *et al.*, Plaintiffs in Error.
} Stipulation.

It is hereby stipulated and agreed by and between the attorneys and solicitors of the respective parties in the above-entitled cause that the clerk of the Supreme Court may omit from the printed record in said cause all portions thereof except the following, to wit:

Pages 07 to 033, both inclusive, and pages 0121 to 0188, both inclusive, in volume 1 of the Record, and pages 1036 and 1037 in volume 2 of Transcript; and it is agreed that the above-specified pages of the transcript present fully all the issues to be determined by the court, and that the plaintiff in error relies upon the errors assigned in said record and transcript.

This March 2nd, 1896.

JOHN F. FORBIS,
Attorney and Solicitor for Defendants in Error.
ROB'T B. SMITH,
ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

1039 [Endorsed:] Case No. 16,233. Supreme Court U. S., October term, 1897. Term No., 145. Wm. A. Clark, P. E., *vs.* Wm. F. Fitzgerald *et al.* Stipulation as to printing record. Filed March 20, 1896.

Endorsed on cover: Case No. 16,233. Montana supreme court. Term No., 145. William A. Clark, plaintiff in error, *vs.* William F. Fitzgerald, Meyer Genzberger, James W. Forbis, and William P. Forbis. Filed March 20, 1896.

No. 145.

Brf. of Word for

Filed Oct. 4, 1897.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

NO. 145.

WM. A. CLARK,
Plaintiff in Error.

vs.

WM. F. FITZGERALD, ET AL.
Defendant.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

ROBERT B. SMITH, and
ROBERT L. WORD.
Solicitors and Attorneys for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

NO. 145.

WM. A. CLARK,

Plaintiff in Error.

vs.

WM. F. FITZGERALD, ET AL.

Defendant.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

ROBERT B. SMITH AND ROBERT L. WORD,
Solicitors and Attorneys for Plaintiff in Error.

ARGUMENT.

Since preparing our brief upon the case in chief, we have been served with a notice of motion to dismiss the appeal upon the ground that the record does not present to this Court a federal question for deter-

mination, and the defendants in error in their brief allege several reasons for their position. It is true as stated in the brief of defendants in error, that there is no bill of exceptions in this record, but because there was no bill of exceptions is no reason why the question may not be properly raised and presented in some other form in the record.

Counsel in their argument admit that the question which it is sought to have the Court determine by this appeal is an important and vexed question, and that it should have been determined ere this, yet they are not now willing to have the Court determine the question, but prefer that the Court should further postpone the evil day by dismissing this ecord, alleging as they do, that the record does not raise any question of federal jurisdiction.

In their brief, Counsel for defendants in error make a serious mistake; they make the statement that the Supreme Court of the United States will not look to any part of the record except the pleadings to ascertain whether or not a federal question is raised. Such doctrine, we do not believe, will be sanctioned by this Court. If it appears in any part of the record legitimately before this tribunal, that a federal question is raised, then the jurisdiction of this Court is complete, and upon this, we cite the following authorities:

Exparte Smith, 94 U. S. 455.
Kempe vs. Kennedy, 5 Cranch 173.
Goodenough Mining Co. vs. Rhode Island Mfg. Co. 24 Cal. 368.
Stevens vs. Nichols, 130 U. S. 230.
Chapman vs. Barney, 129 U. S. 677.
Cameron vs. Hodges, 127 U. S. 322.
Anderson vs. Watt, 138 U. S. 644.
Continental Insurance Co. vs. Rhoads, 119 U. S. 237.
Peper vs. Fordyce, 119 U. S. 469.
Johnson vs. Christiansen, 125 U. S. 642.

In Exparte Smith, 94 U. S. 455, the Court says:

"The facts upon which the jurisdiction of the Courts of the United States rests *must in some form appear in the record* of all actions prosecuted before them, and the doctrine there announced is repeated so often, that it is wholly unnecessary to cite further authorities."

In determining whether a federal question is raised this Court will look at the whole record, including the opinion of the Supreme Court of Montana, and will not eliminate that opinion in considering the matters presented.

Counsel for the defendants concede in their brief, that if a federal question is raised by the pleadings in the cause, that in that event it is presented in such shape that this Court will be compelled to take cognizance of that fact. Without assenting to their con-

tention that the federal question must be raised in the pleadings only. We will attempt, for the sake of argument, to show that such a question is squarely raised by the pleadings in this case, and we will further show by the printed record before you, that the Supreme Court of Montana, passing upon and construing the pleadings in this case, concede that a federal question is raised in said pleadings.

Counsel for defendants in error further state in their brief on this motion as follows:

"It is possibly true that this issue (meaning the extralateral rights of the defendants in error) was tendered by the pleadings, but there is nothing in the record to show what view was taken of the question by the Court which tried the case."

Here is a practical confession that the pleadings did raise the question, then taking the opinion of the Supreme Court of Montana as set forth in the printed record covering 21 pages thereof, discussing singly and solely the question as to whether or not the defendants have the right to follow their vein on its dip into the earth, and underneath the "Black Rock" claim, how can it be contended that a federal question is not raised in this Court? If a federal question was not presented to the Supreme Court of Montana, then all its labor and research in preparing and expounding their view of the law was wholly useless, for they do not attempt to place their decision upon any other

ground than a construction of section 2322 of the Rev. Stats. of the United States. On page 19 of the printed record, the Supreme Court of Montana, referring to the question whether a federal question was presented in the pleadings in this cause for adjudication, uses this language:

"In other words the "Black Rock" contends that under that decision (meaning the Amy & Silversmith case) if the "Niagara" apex leaves the "Niagara" claim through a side line as it does, the "Niagara" is limited in following down the dip of the vein to a perpendicular plane, drawn downward through that side line, the line H. B. on the diagram, whereas the District Court did not so limit them, but held in its judgment that the "Niagara" could take the ore on the dip of the vein under the apex A. E. and east of the point A., although such vein on its dip extended southward under the "Black Rock" north side line, that is to say, the District Court gave judgment in accordance with the law of the Amy & Silversmith case in the 9th Montana which was declared not to be the law in the Amy & Silversmith case in 152 U. S. *We will concede to the "Black Rock" that this question is raised by the pleadings*, and we shall proceed to determine whether the "Niagara" or the "Black Rock" owns the ore in dispute taken from the place marked "ore bodies" on the diagram on page 16 of the printed record."

This quotation disposes of so much of the defendants' brief as contends that there is nothing in the record to show which way the Trial Court ruled on the trial of this cause, for the Supreme Court in passing upon the question distinctly asserts that the Trial Court gave to the claimants of the "Niagara" the right to follow their vein on its dip, contrary to the rule laid down in the Amy & Silversmith case, 152 U. S.

If our contention is correct that the pleadiugs raised this issue, then it was impossible for the Court below to have rendered judgment for the defendants in error, because the ore extracted was outside and beyond the surface lines of the "Niagara," and at the point designated as "ore bodies" on the diagram page 17 of the printed record used by the Supreme Court of the State.

Counsel for the defendants do not seem to realize that when a question is raised by the pleadings or the judgment roll in any case, it may be reviewed by any Superior Court upon proper appeal or writ of error without any form of exception. It is enough to show simply that upon the judgment roll the decision or judgment should be different, and it was not necessary to take an exception to the entering of judgment in the lower Court. This Court will undoubtedly follow the decision of the Supreme Court of Montana upon a question as to what is raised or pre-

sented in the record of a case tried in the State Court. That Court is the highest and best authority for the construction of pleadings and questions of practice in the State Courts, and when that Court has construed such a question, this Court will undoubtedly follow its construction.

This principle is so well established that it does not here require a citation of authorities, and the Supreme Court of Montana having determined that a federal question was properly raised in the pleadings in this case, it would not seem necessary to further elucidate the question as to what was raised, or is raised by the pleadings.

The authority cited by defendants' Counsel, that no question can be reviewed on appeal or error without an objection or exception having been taken in the Trial Court, is undoubtedly true so far as it relates to the method of procedure during the course of the trial, or the matters of practice not presented in the judgment roll, but there never has perhaps been any doubt upon the doctrine, that you can raise in any Court of appeal any question presented by the judgment roll, regardless of whether or not an exception was taken.

So strongly intrenched is this doctrine in the laws of Montana, that the Legislature has enacted by section 1151 of the Code of Civil Procedure. that no

bill of exceptions is required to the following matters:

"The verdict of the jury, the instructions and "charge of the court; the final decision of an action "or proceeding; an interlocutory order and decision "finally determining the rights of the party or some "of them; an order or decision from which an appeal "may be taken, an order sustaining or over-ruling a "demurrer, allowing or refusing to allow an amend-"ment to a pleading, striking out a pleading or a por-"tion thereof, refusing a continuance; an order made "upon an exparte application; an order or decision "made in the absence of the party are deemed to have "been excepted to, and no bill of exceptions is re-"quired."

Why is it then in view of this Statute, and in view of the opinion of the Supreme Court of Montana as shown in this record, that Counsel insist that we cannot review any question here which is raised by the judgment roll in the cause, nor are we precluded from relying upon the opinion of the Supreme Court of Montana to determine what questions are raised. That opinion is a part of this record; it is to reverse that opinion and that judgment, that this writ of error is prosecuted, and if facts appear in that opinion (it being a part of the record before this Court) which show that a federal question was raised, or is raised by this record, we are entitled to the benefit of such

showing in determining what questions are presented. It matters not in what part of the record the jurisdictional facts appear, if they appear anywhere, either by affidavit, the pleadings, petition for removal, judgment of the Court, or in any other legitimate way properly presented to this Court, then the Court will not dismiss the writ of error. But in order that you may see that the question is squarely raised by the pleadings, we quote as follows, beginning on page 2 of the printed record of the amended complaint:

"That the said "Niagara" lode claim is a quartz "lode claim, and as such embraces a quartz vein, the "top or apex of which crosses the south line of the "Niagara" lode claim 560 ft. in a westerly direction "from the north east corner No. 1 of the "Black "Rock" lode claim, said south line of the "Niagara" "lode and the north line of the "Black Rock" "lode at the point of departure of said vein "being identical; and the said vein from the said "point of entering the south line of the said "Nia-"gara" lode continues with its top or apex within "the surface lines of the "Niagara" claim easterly "until it crosses the east end line of the said "Nia-"gara" lode claim, and that the said vein in its down-"ward course or dip departs from the surface lines of "the said "Niagara" lode into and under the "Black "Rock" lode, which lies south of and adjoining the "Niagara" lode. * * *

"That heretofore, to-wit, on or about the first day "of March, 1890, the said defendants without plain- "tiff's consent, by underground workings, levels, "winzes, stopes and shafts entered upon said vein "upon its downward course or dip, began to extract, "and ever since have continued to extract, and are "now extracting large quantities of ore, which ore "was extracted from the vein hereinbefore described "upon its downward course or dip, and on that por- "tion which had its apex upon the "Niagara" lode "claim."

This is the statement of the facts as presented in the amended complaint. Now the answer states the facts as follows:

"Defendant further answering avers the fact to be "that said "Niagara" lode claim was not located on "or along the course or strike of any vein, the top "or apex of which lies within the lines of said lode "claim, but was located across said vein and across "the vein from which plaintiffs claim that defend- "ants have extracted ore belonging to plaintiff, "and that by reason thereof, the side lines of said ""Niagara" lode claim became and are the end "lines of said lode claim, and should be drawn "down vertically, and for the reason that said "side lines became the end lines of said lode claim, "plaintiffs have no right, in case said veins or any of "them should, upon their downward course or dip,

"depart from the side lines of said "Niagara" lode "claim, and under or into the "Black Rock" lode "claim, to follow the same in said downward course "or dip into or under the side line of said "Black "Rock" claim. * * *

"Denies that said plaintiffs, or any of them, as own-"ers or otherwise, were or are entitled to the vein or "lode upon which the alleged trespass was committed, "or are entitled to the same in its downward course "outside of the side planes of the surface location of "said "Niagara" lode claim, drawn down vertically, "or are entitled to any part or portion of the ore of "said vein outside of the surface lines of said "Nia-"gara" lode claim, and especially that portion from "which it is alleged the said quartz and ore was taken "by the defendants in this action." * * *

"That at, and before, and continually during the "time of the alleged trespass, this defendant had and "held a lease from all the other defendants in this ac-"tion to their right, title and interest in, and to said "Black Rock" lode claim with all the veins, lodes "and ledges, the tops or apexes of which were with-"in the lines of said "Black Rock" lode claim, and "rights, easements and privileges thereto lawfully be-"longing, that as such lessee this defendant went in-"to the actual possession of said "Black Rock" lode "claim and did manage, mine and conduct said "Black "Rock" lode claim during all the time of the alleged

"trespass, set out in the plaintiffs' complaint, and has "before the commencement of this suit, and before "the time of the supposed trespass mentioned in said "complaint, continually as such lessee mined and ex- "tracted quartz and ore from said "Black Rock" lode "claim, and particularly the quartz and ore mention- "ed in said complaint."

This statement in the answer, that the ore taken by the plaintiff in error was taken from the "Back Rock" lode claim is not denied in the replication. The replication simply denies that, that vein from which the ore was taken had its top or apex in the "Black Rock" claim, thus the Court will see that from the exact language of the pleadings, there can be no doubt that the construction of section 2322 of the Rev. Stats. of the United States is squarely put in issue, and our contention that such issue and construction of such statute was raised by the pleadings is conceded in the opinion of the Supreme Court of Montana, page 19 of the printed record. That this question is important and should be passed upon and determined by this tribunal is admitted on all sides. Litigation involving the same question which we ask this Court to determine now, will be multiplied and augmented by further delaying or putting off the evil day.

If this question had been determined by this tribunal when it was first presented to it in the Tyler and

Last Chance case, this writ of error would not have been necessary. It must be met sooner or later, and we do not believe it was the intention of the framers of Constitutional Government in this country that the Supreme Court of the United States should refuse to determine proper questions presented to it, or postpone their determination to a later day. Justice to litigants demands that this tribunal should determine at the first opportunity every legitimate question properly presented.

If the Court desires further to postpone the decision of this question, it may be able to sustain this motion to dismiss this writ, but if it shall determine that the question ought to be decided, and at the earliest day practicable, it will find ample warrant and authority in this record for saying and holding with the Supreme Court of Montana that the question is raised in the pleadings, and not only is it raised in the pleadings, but it is forcibly presented as the sole question in the opinion of the Supreme Court of the State, and it is to reverse that decision, and to establish the right doctrine as the law of the land, that this writ is prosecuted.

Trusting the Court will not further delay a decision of the important question presented in this record, we submit the cause, with the hope that this mo-

tion may be denied, and that the cause be submitted and heard upon its merits.

Respectfully,

ROBERT B. SMITH, and

ROBERT L. WORD.

Solicitors and Attorneys for Plaintiff in Error.

No. 145.

Brief of Forbis for D. C. (mo.)

Filed Sept. 27, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS AND WILLIAM P. FORBIS

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR, WITH NOTICE THEREOF, AND BRIEF ON MOTION.

(16,233)

In the Supreme Court of the United States. October Term, 1897.
No. 145.

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM F. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

To the above named Plaintiff, and to his Attorneys, Robert B. Smith and Robert L. Word:

You will please take notice that defendants in error will on Monday, the 11th day of October, 1897, at the convening of the Court, or so soon thereafter as application can be made and heard, move the Supreme Court of the United States to dismiss the writ of error issued in the above entitled cause and matter, and to remand said cause to the Supreme Court of Montana, and to affirm the judgment of the Supreme Court of Montana.

A copy of the motion, embodying the grounds upon which the same is made, together with a copy of the argument and brief of the defendants in error, is herewith served upon you.

This September 4th, 1897.

JAMES W. FORBIS,
In Person, and Attorney for Other Defendants in Error.

Accept service of foregoing notice, with copy of motion and of argument and brief of defendants in error, this 10th day of September, 1897.

ROBERT B. SMITH,
ROBERT L. WORD,
Of Helena, Montana, Attorneys and Solicitors for Plaintiff in Error.

In the Supreme Court of the United States. October Term, 1897.

No. 145

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM F. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

Now come the above named Defendants in Error, and move the Court to dismiss the Writ of Error, issued in the above entitled cause and matter, and to remand said cause to the Supreme Court of the State of Montana, and also to affirm the judgment of the Supreme Court of the State of Montana, upon the following grounds, namely:

First. That it appears from the record that this Court has no jurisdiction of said cause, and that the Writ of Error was erroneously issued therein, for the reason that the record presents no question involving the construction of the Constitution of the United States, or of any Statute or Treaty of the United States, nor does the record present any question of law for the consideration of the Court.

Second. That it appears from the record that this Court has no jurisdiction of said cause, and that the Writ of Error was erroneously issued therein, for the reason that there is not in the said record any objection or bills of exception to any alleged erroneous rulings of the trial Court, and that all objections of the Plaintiff in Error to any rulings of the trial Court have been by him waived.

Third. That the Writ of Error was granted upon the ground that the judgment was not supported by the pleadings, whereas the pleadings fully sustain the judgment, and there is no error apparent in the record.

JAMES W. FORBIS,
In Person, and Attorney for Other Defendants in Error.

September 4th, 1897.

In the Supreme Court of the United States. October Term, 1897.

No. 145.

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM G. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

STATEMENT.

The defendants in error sued the plaintiff in error for the value of certain ores extracted from a vein, alleged to have its apex in the Niagara Lode claim.

The answer of the plaintiff in error denies that the apex of the vein from which the ore was extracted was within the limits of the Niagara Lode claim, but alleges that the apex is within the lines of the Black Rock Lode claim, to which claim plaintiff in error is entitled.

As a further defense plaintiff in error also alleges that the veins in the two locations or claims unite on their downward course, and in consequence of the Black Rock claim being the older, that he was entitled to all ore below the junction.

Another defense set up in the answer is to the effect that the Niagara claim was not located along but across the vein in controversy, and that in consequence the side lines became end lines, and that no extra lateral rights attached to such vein by virtue of the Niagara location.

All of these matters were put in issue by the replication.

A trial by jnry was had which resulted in findings in favor of Plaintiffs—Defendants in Error—and are to the effect that the apex of the vein in controversy passes entirely within the Niagara boundaries at a point 513 feet westerly from the northeast corner of the Black Rock claim, and that the value of ore extracted from the vein in controversy was the sum of $40,863.81.

Upon the verdict and findings a judgment was rendered for the Plaintiffs below, adjudging Plaintiffs below to be entitled to the vein after the same passes into the Niagara lode claim, and awarding them damages in the sum of $27,242.54, being two-thirds of the value of the entire ore extracted by Plaintiff in Error from the vein in controversy.

The Plaintiff in Error moved for a new trial in the Court below, and embodied the evidence and certain exceptions in a statement on motion for new trial. The motion for new trial was overruled, and Plainttff in Error appealed to the Supreme Court of Montana from

the judgment and order overruling the motion for a new trial. The Supreme Court of the State affirmed the judgment of the lower Court; and a Writ of Error is sued out from this Court to review the proceedings of the State Supreme Court.

There is no bill of exceptions in the record. So far as the record shows no exceptions were taken except such as are embodied in the statement on motion for new trial, and these are not before this Court for examination. By stipulation of parties the printed record contains only the pleadings, verdict and judgment, of the record of the trial Court.

Upon this motion to dismiss the appeal, the question presented is: Is there anything in the record which can justify this Court in reviewing the trial Court and the Supreme Court of Montana?

ARGUMENT AND BRIEF.

The Plaintiff in Error is attempting to raise upon this Writ of Error the very vexed question, which has often been before this Court but remains undecided, to-wit: Do extra lateral rights attach to a vein when its apex passes through an end line and side line of the claim? The decision of this question is of great importance to the mining industry, and one which Defendants in Error submit should be presented upon a record, showing the facts in such clear and unmistakable manner as to give the Court a full and fair opportunity for its discussion and decision. Each and every one of the seven assignments of error is directed to this one question of law, and Plaintiff in Error does not contend that there is any error in the record, except rulings of the Court in giving extra lateral rights to a vein passing through an end and a side line. It is true that the Supreme Court of Montana has announced in this case the doctrine which Plaintiff insists is incorrect. But unless the record is in condition to be reviewed by this Court, we take it it will not undertake to review the State Supreme Court, although it might be evident that the State Supreme Court was in error.

The instructions given upon the trial were not excepted to, and the Supreme Court of Montana, having the whole record before it, refused to review the instructions for that reason. Proceeding however, the Supreme Court say: "We will concede to the Black Rock that this question is raised by the pleadings," etc., (p. 19.) And upon this assumption the cause was discussed and affirmed.

Eliminating the opinion of the Supreme Court, there is nothing in the printed record to show how the lower Court ruled upon any question. In fact there is nothing to indicate whether the ores in question were extracted from the Niagara or Black Rock claim. For

aught that appears the ores may have been extracted from within the lines of the Niagara claim, and from a vein having its apex in such claim.

With all respect to the Supreme Court of the State, we submit that the question discussed in its opinion, which it is sought to have this Court pass upon, is not presented in a reviewable shape by the pleadings. It is true that the issue was presented as one of fact, the defendant below alleging that the Niagara Lode claim was not located "along" but "across" the vein, thereby rendering the side lines end lines. But this is controverted by affirmative allegations in the complaint, and by denials in the replication. It is possibly true that this issue was tendered by the pleadings, but there is nothing in the record to show what view was taken of the question by the Court which tried the cause. Closing our eyes to all that portion of the record not printed, it could as conclusively be asserted that the Court ruled against the extra-lateral rights of the plaintiffs below as in favor of them. We have pleadings tendering an issue. and a judgment founded thereon. Furthermore, defendants in error sue to recover their proportion of ores extracted from the downward course or dip of a vein having its apex in the Niagara ground. They allege in their complaint (Record page 2) that plaintiff in error extracted and converted ores from such a vein "and still continue * * * * * to extract ore from said vein as aforesaid in its downward course or dip, both *within and without* the vertical side lines of the said Niagara Lode claim." The findings, verdict and judgment show that the ore in controversy was taken from the downward course or dip of a vein having its apex within the Niagara lines, but there is nothing in the record to show what portion of the ore was extracted *within* or what portion of the ore was extracted *without* the vertical side lines of the Niagara Lode. From aught that appears in the record, all of the ore may have been extracted from within the lines of the Niagara Lode. Whether the rulings of the Court were in favor of plaintiffs to the full extent of their contentions, or limited their right of recovery to ores extracted from within their own ground, we may not know upon this appeal. Had the judgment been against the plaintiffs below, they could with equally as good reason ask this Court to review the judgment, because the ruling might have been made against them.

In other words, plaintiff in error is asking this Court to assume, without any record to sustain the assumption, that the trial Court has ruled incorrectly upon issues presented, because under the issues raised the Court might have ruled to his detriment.

If plaintiff in error should insist that the judgment entered herein shows the ruling of the Court upon this question, we answer:

1st. There is nothing in the judgment to show upon what it is based. Had the Court instructed the jury against extra-lateral rights, the judgment would be the same as at present. There is nothing in the judgment more than in the pleadings, showing what view the Court took of the question.

2nd. Should the judgment be construed as a ruling upon the question, then we contend that there should have been an objection and exception to the entry of the judgment. For aught that appears there has been a complete acquiescence in the entry of the judgment, so far as any diversity of opinion is concerned as to the law of the case.

And this brings us to the question: Had not the plaintiff in error by his action in failing in every respect to object or except to the ruling of the Court, estopped himself from asking to have those questions reviewed by this Court? The Supreme Court of Montana, having the whole record before it, states in its opinion (page 19) "that no exceptions to these instructions were preserved or specified, so that they can be now reviewed," and then proceeds to discuss the case upon the ground that the question is raised by the pleadings, stating that the Court concedes that, without really determining such to be the case.

It is apparent from the whole record, that the plaintiff in error did not object to the ruling of this Court in determining that extra-lateral rights followed a vein passing through the end and side lines of a mining claim. The instructions to that effect were acquiesced in as correct principles of law, and no objections or exceptions were ever taken or recorded against the Court's rulings upon these matters. Not until this Court, in the case of King vs. Amy and Silversmith Mining Co., 152 U. S. 222, made its decision, which was after the trial of the case at bar, did the plaintiff in error attempt to avail himself of objections which he had failed to take, and which he had theretofore actually waived.

It seems useless to call the Court's attention to authorities, holding that objections and exceptions must be taken before the appellate courts can review errors complained of. The whole matter is so well stated, however, in the text of Volume 8 of the Encyclopedia of Pleading and Practice, page 157, that we feel constrained to quote it:

"As a general rule, objections which were not taken upon the trial or in the course of proceedings below cannot be urged upon appeal or error. This doctrine is founded upon considerations of

great importance to the administration of justice, and which are recognized to a greater or less extent in the practice of all the courts, The constant application which is made of this rule shows how well it serves the interests of the public as well as of litigants. It is certainly not unreasonable to require a party desiring to review, in an appellate court, the action of the trial court, to call the attention of the trial court, by seasonable objections, to the proceeding complained of."

Again, on page 163:

"An objection alone is not sufficient to preserve a question for review on appeal or error. To save the objection an exception is necessary. This rule is as well settled as that requiring an objection to be made when the action deemed to be erroneous is taken. In the absence of an exception, errors committed by the trial court will be considered waived."

We therefore respectfully submit that this writ of error should be dismissed, upon the ground that there is nothing in the record which can authorize this Court, as a Court of Review, to take jurisdiction of it. It does not appear what, if any, rulings, were made by the trial Court, nor is there a semblance of objection or exception to anything done by the trial Court, When parties to the record acquiesce in the rulings of a Court, they can never be heard to thereafter complain that in such matters the law has been misconstrued.

Respectfully submitted,

JAMES W. FORBIS,

In Person, and Attorney for Other Defendants in Error.

IN THE

OCTOBER TERM, 1897.

WILLIAM [illegible],

Plaintiff in Error,

vs.

WILLIAM F. FITZGERALD,
MILTON O'BRIEN BROWNE,
JAMES W. FORBES and
WILLIAM F. FORBES,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT B. SMITH, and
ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

NO. 145.

WILLIAM A. CLARK,

Plaintiff in Error.

vs.

WILLIAM F. FITZGERALD,
MEYER GENZBERGER,
JAMES W. FORBIS and
WILLIAM P. FORBIS,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT B. SMITH and ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

STATEMENT OF THE CASE.

This cause comes here on a writ of error directed to the Supreme Court of the State of Montana, and the questions involved grow out of the following state of facts.

The plaintiff in error is the owner and in possession of the "Black Rock" lode mining claim situated in the "Summit Valley" mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the "Niagara" lode mining claim situated in the same district and county. The "Niagara" lode lies along side of the "Black Rock" lode so that the south side line of the "Niagara" forms or is a part of the North side line of the "Black Rock" lode, as shown in the diagram on page 17 of the agreed printed record.

The "Black Rock" lode is the older of the two locations. As appears from the pleadings in the cause and the diagram above referred to the vein or lead crosses the east end line and south side line of the "Niagara" lode 513 feet west of the north east corner of the "Black Rock" lode and dips to the south and under the surface of the "Black Rock" lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the "Black Rock" and "Niagara" lode claims and extracted ore from the said vein on its dip under the "Black Rock" lode at the point above described, and which is designated on the diagram at page 17 of the printed record as "ore bodies."

Thereupon the defendants in error, who as stated supra own two thirds ($\frac{2}{3}$) interest in the "Niagara"

lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of $27,-242.54, being two thirds the value of the ore extracted and for ($234.50) two hundred thirty four and 50-100 dollars the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower Court was affirmed in the opinion set forth in the record beginning on page 17 printed record.

The questions presented by this record for decision are raised solely by the judgment roll consisting of the pleadings and judgment of the lower Court and opinion of the Supreme Court of the State.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

It appears from the pleadings in the above entitled cause that the defendants in error above named are the owners of an undivided two thirds of the "Niagara" quartz lode claim, and the plaintiff in error is the owner and in possession of the "Black Rock" quartz lode claim; and it further appears from said pleadings that the north side line of the "Black Rock" lode claim is also the south side line of the "Niagara" lode claim, owned in part by the defendants in error; and

it further appears from the pleadings in said cause and from the judgment rendered therein that the apex of the vein or lode of the "Niagara" claim passes through the east end line of said claim and running thence westerly at a point 513 feet west from the northeast corner of the "Black Rock" claim the apex of said vein or lode of the "Niagara" claim passes through the south side line of said "Niagara" lode or claim, and notwithstanding such fact, the Supreme Court of the State of Montana decided that the defendants in error had a right to follow that portion of said vein which had its apex inside of the surface lines of the "Niagara" claim on its dip or pitch into the earth to the south, underneath and within the surface lines of the "Black Rock" claim extended vertically downward, claimed, owned and possessed by the plaintiff in error, and in this the Court erred.

II.

The said Supreme Court of Montana erred in deciding that where the apex of a vein, lode, or ledge passed diagonally through one end line and one side line of the "Niagara" claim owned by defendants in error, that said defendants in error had a right to follow the said vein or lode on its dip into the earth outside of their surface lines extending vertically downward and into and underneath the surface and within the surface lines of the "Black Rock" claim extend-

ing vertically downward, the said last-named claim being owned and possessed by the plaintiff in error.

III.

The said Supreme Court of Montana erred in deciding that where the apex of a vein or lode crosses two surface lines of a mineral claim, which said lines are not parallel to each other, that the owners of such a vein or lead have the right to follow such a vein or lode on its dip into the earth underneath the surface and within the surface lines of an adjoining claim.

IV.

The said Supreme Court of Montana erred in disregarding that portion of section 2320 of the Rev. Stats. of the United States, requiring the end lines of each location or claim to be parallel to each other.

V.

The said Supreme Court of Montana erred in refusing to hold that where the apex of a vein or lode crosses one end line and one side line of a claim, such side line becomes in effect an end line.

VI.

The said Supreme Court of Montana erred in refusing to follow the law as announced by the Supreme Court of the United States in case of King vs. Amy and Silversmith Co., 152 U. S., 222, construing sec-

tions 2320 and 2322 of the Rev. Stats. of the United States.

VII.

The said Supreme Court of Montana erred in attempting to lay down a rule by which the lines of a mining claim or mine can be readjusted, so as to give the holder thereof extralateral rights and permit him to follow his vein on its dip into the earth without having parallel end lines crossed by the apex of the vein or lode.

ARGUMENT.

This cause presents to this Court for the first time a new question for adjudication. In some respects analogous questions, have already been settled by this tribunal. but the exact question here presented has never been decided.

See Tyler Mining Co., vs. Last Chance Mining Company, 157 U. S. 696.

As stated in the preceding part of this brief and as shown on page 2 of the printed record, the apex of the vein or lode of the "Niagara" claim crosses the east end line and the south side line of said "Niagara" claim. It also appears from the amended complaint on page 2 of the printed record that the plaintiff in error entered upon said vein upon its downward course or dip into the earth and extracted there-

from certain valuable ores for an accounting of which this action was brought; in order that the Court may clearly have before its mind that part of the complaint, we quote as follows:

"That the said "Niagara" lode claim is a quartz "lode claim, and as such embraces a quartz vein the "top or apex of which crosses the south line of the "Niagara" lode claim 560 feet in a westerly direc- "tion, from the northeast corner No. 1 of the "Black "Rock" lode claim, lot No. 53, in T.3 N., R. 7 W., *the "said south line of the "Niagara" lode and the north line "of the "Black Rock" lode at the point of departure of "said vein being identical;* and the said vein from the "said point of entering the south line of the said "Ni- "agara" lode claim continues, with its top or apex "within the surface lines of the "Niagara" lode claim, "*easterly until it crosses the end line of the said "Ni- "agara" lode claim*, and that the said vein in its down- "ward course or dip departs *from within the surface "lines* of the said "Niagara" lode claim *into and under* "the said "Black Rock" lode claim which lies south "of, and adjoining the said "Niagara" lode claim.

"That heretofore, to-wit, on or about the 1st day of "March, 1890, as plaintiffs allege on information and "belief, the said defendants without plaintiff's con- "sent, by underground workings, levels, winzes, stopes "and shafts, entered upon the said vein *upon its "downward course or dip*, and began to extract, and

"ever since have continued to extract, and are now "extracting therefrom large quantities of ore, which "at the date of the commencement of this action "amounted in value to the sum of two hundred and "thirteen thousand dollars, and which ore was ex-"tracted from the vein hereinbefore described upon "its *downward course or dip*, and on that portion "thereof which has its apex upon the "Niagara" lode "claim hereinbefore described."

It will be seen from the above quotation that the ore taken by the plaintiff in error was from that portion of the vein which had its apex within the surface lines of the "Niagara", but the ore was taken from the vein on its downward course or dip, and as disclosed by the amended complaint, the vein dipped to the south and underneath the "Black Rock" claim, and it was upon this dip or downward course of the said vein that the plaintiff in error entered and extracted the ore sued for.

It is not contended that the plaintiff in error entered upon any part of the vein within the surface lines of the "Niagara" lode. If we apply to the amended complaint of the defendants in error, the rule usual in the construction of pleadings, that the pleadings or statements of a party are to be taken or construed most strongly against the pleader, it is apparent that the ore was taken from that portion of the vein which had its apex in the "Niagara" claim, but from that

part of the vein included within the surface lines or side lines of the "Black Rock" claim extended vertically downward; in other words, from the amended complaint it cannot be gathered that the plaintiff in error took one ounce of ore from any part of the vein included within the surface lines of the "Niagara" claim extended vertically downward, and to further strengthen our position as to where the plaintiff in error procured the ore, we will quote from the answer of W. A. Clark to the amended complaint, beginning with the last paragraph on page 4 of the printed record which reads as follows:

"Defendant, further answering, avers the fact to be "that said "Niagara" lode claim was not located on "or along the course or strike of any vein, the "top or apex of which lies within the lines of "said lode claim, but was located across said "veins and across the vein from which plaintiffs "claim that defendants (plaintiff in error) have ex-"tracted ore belonging to plaintiffs, and that by "reason thereof, the side lines of said "Niagara" lode "claim, became and are the end lines of said "Niag-"ara" lode claim, and should be drawn down verti-"cally, and for the reason that said side lines became "the end lines of said lode claim plaintiffs have no "right, in case said veins or any of them should upon "their downward course or dip depart from the side "lines of said "Niagara" lode claim, and under or

"into said "Black Rock" lode claim, to follow the "same in said downward course or dip into or under "the side lines of said "Black Rock" claim." * * *

"Denies that said plaintiffs or any of them, as own-"ers or otherwise, were or are entitled to the vein or "lode upon which the alleged trespass was committed, "or are entitled to the same in its downward course "outside of the sideplanes of the surface location of "said "Niagara" lode claim, drawn down vertically, "or are entitled to any part or portion of the ore of "said vein *outside of the surface lines of said "Niag-"ara" lode claim*, and especially that portion thereof "from which it is alleged that the said quartz and ore "was taken and removed by the defendants in this "action." * * *

"That as such lessee the defendant went into the act-"ual possession of said "Black Rock" lode claim, and "was entitled to the possession of the same, with the "right to mine and extract quartz, rock, or ore there-"from without let or hindrance from the other defend-"ants in this suit, and was entitled to and did man-"age, mine and conduct said "Black Rock" lode "claim during all the time of the alleged trespass set "out in plaintiffs' complaint, and long prior thereto, "and has, before the commencement of this suit and "before the time of the supposed trespass mentioned "in said complaint, continually, as such lessee, mined "and extracted quartz and ore from said "Black

"Rock" claim, and particularly the quartz and ore "mentioned in said complaint and which is claimed "by plaintiffs, and which constitutes the supposed "trespass set out in plaintiffs' complaint." * * *

"That this defendant at the time of mining and ex-"tracting the ore from said "Black Rock" lode claim, "which constitutes the supposed trespass set out in "plaintiffs' complaint, acted in good faith and then "believed and still believes that all the said ore was "mined and extracted from ledges or veins, the tops "or apexes of which lie inside of the said "Black "Rock" lode claim."

"It is admitted by the pleadings in said cause, that the "Black Rock" lode claim was prior in time of location and patent."

It will be noticed from the quotation of the above answer that the ore was taken *from the "Black Rock" lode claim.* This allegation appears more than once in the answer, and is not denied in the replication. The only denial in the replication is a denial that the *vein or lode* from which the plaintiff in error took the ore had its *top or apex* within the side lines of the "Black Rock" claim drawn vertically downward. No where in the replication is there any claim that the plaintiff in error went out side of the surface lines of the "Black Rock" claim to procure the ore, for which suit was brought.

The question thus presented for determination by this Court by the pleadings in this case is as follows: Where a vein or lead of quartz in place crosses one end line of the surface location as marked upon the ground and also crosses one of the side lines of said location, has the owner or patentee of such location a right to follow the said lead, or so much thereof as has its apex within the surface lines of his location on its pitch or dip into the earth outside of planes drawn vertically downward through the surface lines of his location?

If such a claimant or locator has no right to go beyond planes drawn vertically downward through his surface lines, then the judgment in this cause is incorrect and should be reversed.

If our view of the law is correct, the pleadings present a case where judgment should have been rendered for the plaintiff in error. In fact the complaint does not state facts sufficient to support the judgment.

From the complaint set out in the printed record, pages 1 to 3 inclusive it is apparent that the vein or lode claimed by the owners of the "Niagara" claim passes through the east end line and the south side line of said claim. These two lines are not parallel but are almost at right angles to each other as disclosed by survey set out in the amended complaint.

Section 2320, Rev. Stats. of the United States requires that "the end lines of each claim shall be parallel to each other." And Section 2322 provides that the locators or owners of any mining claim "shall be entitled to the veins or lodes, the top or apex of which is within the surface lines extended vertically downward throughout their entire dip, even though they may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. "But their right of possession to such outside part of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end lines of their location, so continued in *their own direction* that such planes will intersect such veins or ledges."

By Section 2320 of the Rev. Stats. of the United States, it will be seen that the first requirement of the Statute in respect to the rights of locators is, that the *end lines* of the claim *shall be parallel*, and that so much of the vein as lies between planes drawn vertically downward through the end lines until the ledge is intersected by such planes belongs to the locator on its dip into the earth. The lines designated by the locator in his surface location *as end lines*, are not necessarily such; it frequently happens that the side lines are in fact the end lines of the lode or vein. See

Iron Silver Mining Company vs. Elgin Mining Co., 118 U. S. 196.

Iron Silver Mining Company vs. Elgin Mining Co., 14 Fed. Rep. 377.

Flagstaff Mining Company vs. Tarbett, 98 U. S. 463

Terrible Mining Company vs. Argentine Mining Co., 122 U. S. 478.

King vs. Amy & Silversmith, 152 U. S. 222.

Tombstone Mining Company vs. Way Up Mining Co., 25 Pac. Rep. 794.

From the foregoing authorities it will be seen that often those lines which are designated as side lines become end lines, by reason of the fact that the vein or ledge crosses them and departs from the claim never to return inside the surface boundaries. It frequently happens that the vein crosses lines which are not parallel, and which by reason of the ledge crossing them and departing from the claim, become end lines. The law does not require parallelism in the side lines of a claim. If then side lines which are not parallel become end lines by reason of having been laid across the strike of the vein, has the claimant any extra lateral rights? In the Amy and Silversmith case, recently before the Supreme Court, it so happened that the side lines of the claim were parallel, and in fact they were more nearly parallel to the general strike of the vein or ledge than the original end lines, but the Supreme Court held that the side lines became the end lines and that the owners

had *no extra lateral* rights on their vein, but were confined to the amount included within planes passed vertically downward through the surface lines of the Amy location.

What rights then can a claimant have whose location is so made that one of the lines he designates as an end line, and one of his side lines cross the vein or ledge so that the same departs from the claim through one end line and one side line? This question would seem to be answered by Section 2322, Rev. Stats. of the United States, which says: "But "this right of possession to such outside parts of "such veins or ledges shall be confined to such por-"tion thereof as lie between vertical planes drawn "downward as above described through the end lines "of their location so continued in their own direc-"tion that such planes will intersect such veins or "ledges."

As the two lines of the "Niagara" claim through which the vein passes as presented by the pleadings in the case at bar, intersect each other almost at right angles the planes drawn downward vertically through them would also intersect at the same angle, and the rights of defendants in error would be restricted to so much of the lead as lies within the planes drawn vertically downward through the two surface lines intersected by the apex of the vein or lode. As the end lines of the "Niagara" claim, or rather the sur-

face lines of the "Niagara" crossed by the vein or lode *are not parallel*, Have the respondents then any extra lateral or extra territorial right? This question is answered in the negative by the following authorities:

Iron Silver Mining Co. vs. Elgin Mining Co., 118 U. S. 196.

Iron Silver Mining Co. vs. Elgin Mining Co., 14 Fed. Rep. 377.

Montana Company, Limited vs. Clark et al., 42 Fed. Rep. 626.

King vs. Amy & Silversmith Consolidated Co. 152 U. S. 222.

Colorado Central Consolidated Co. vs. Turck, 50 Fed. Rep. 888.

Tombstone Mill and Mining Co. vs. Way Up Mining Co. 25 Pac. Rep. 794.

Blue Bird Mining Company vs. Largey, 49 Fed. Rep. 291 and

McCormack vs. Varnes et al, 2 Utah 355.

In the case of Tombstone Mining Co. vs. Way Up Mining Co. supra, the Court says: "Section 2322 "Rev. Stats. of the United States, gives the owner "of a mining claim the right to follow his vein or "lode on its dip only when such vein or lode dips— "that is departs from a perpendicular position—sub- "stantially at right angles with the strike of the vein "or lode, and does not allow him to follow the vein "outside of his claim on the course or strike of the

"vein in any case. If the vein crosses the side lines "on its strike such lines become end lines and termi- "nate the owners right to follow the vein in that di- "rection."

This question was fairly before the Supreme Court of the United States in the case of Iron Silver Mining Co. vs. Elgin Mining Co. 118 U. S. 196, and was fully discussed and considered, and Mr. Justice Bradley, speaking with reference to the extra lateral rights of lode claimants under Section 2322, Rev. Stats of the United States, says: "This section appears sufficiently "clear on its face. There is no patent or latent ambig- "uity in it. The locators have the exclusive right of "possession and enjoyment of all the surface includ- "ed within the lines of their locations; and the loca- "tion by another section must be distinctly marked "on the ground so that its boundaries can be readily "traced. They have also the exclusive right of pos- "session and enjoyment of all veins, lodes and ledges "throughout their entire depth the top or apex of "which lies inside of such surface lines extended "downward vertically, although such veins, lodes or "ledges may so far depart from a perpendicular in "their course downward as to extend outside the ver- "tical side lines of said surface locations. The sur- "face side lines extended downward vertically deter- "mine the extent of the claim except when in its de- "scent the vein passes outside of them, and the out-

"side portions are to lie between vertical planes "drawn downward through the end lines. *This means "the end lines of the surface location*, for all locations "are measured on the surface. The difficulty arising "from the section grows out of its application to "claims where the course of the vein is so variant "from a straight line that the end lines of the sur- "face location are not parallel; or, if so are not at a "right angle to the course of the vein. This diffi- "culty must often occur where the lines of the sur- "face location are made to control the direction of "the vertical planes. The remedy must be found, "until the Statute is changed, in carefully making "the location, and in postponing the marking of its "boundaries until explorations can be made to ascer- "tain as near as possible, the course and direction of "the vein. * * *

"If the first locator will not or cannot make ex- "plorations necessary to ascertain the true course of "the vein, and draws his end lines ignorantly, he "must bear the consequences. * * * Under the "act of 1866, parallelism in the end lines of a surface "location was not required. But where a location "has been made since the act of 1872, *such parallelism "is essential to the existence of any right in the locator "or patentee to follow his vein outside of the vertical "planes drawn through the side lines.* His lateral "right by the statute is confined to such portion of

"the vein as lies between such planes drawn through "the end lines and extended in their own direction, "that is, *between parallel* vertical planes, it can em- "brace no other portion."

This doctrine was further commented upon with approval by Judge Knowles of the United States Circuit Court for Montana in the case of Montana Company, Limited vs. Clark et al., 42 Fed. Rep., 626, where citing the case of the Iron Siver Mining Co. vs. Elgin Mining Co. supra, the learned Judge said:

"This language is decisive of the defendant's right "to follow their vein outside of their side lines. "Having *no parallel end lines*, they cannot do it. *** "Had the defendant so located the Hopeful Claim "that it would have had parallel end lines there can "be no doubt but they would have been entitled to "follow any vein which may have its apex within its "limits, and which *passed through both end lines in "its strike.*"

This language is as plain as it is possible to make it. There can be no ambiguity or double meaning to it. The vein on its strike must pass through both end lines, which must be parallel in order to give the claimant any extra lateral or extra territorial rights to follow his vein on its dip into the earth. In the cause at bar, there can be no extra lateral rights, because the vein or ledge confessedly, according to the pleadings, only passes through one of the end lines of

the surface location and through one side line, all of which clearly appears by an inspection of the amended complaint. Vertical planes passed through these two end lines of the vein would confine the claimants of the "Niagara" to so much, and such parts of their vein or ledge, as would be included within their surface location lines extended downward vertically.

Keeping in mind that the law requires the end lines to be parallel as one of the conditions necessary to give extra lateral rights, and then remembering the universal rule established by all the Courts, that where a vein or ledge crosses a side line such side line becomes an end line, we see no way in which a construction can be placed on this complaint which would present facts sufficient to constitute a cause of action or support the judgment.

Hence we contend the Court erred as specified by us in the record.

It was pertinently said by the Supreme Court of the United States in the case of Iron Silver Mining Co. vs. Elgin Mining Co. supra, "That it is not the "duty of the Court to make new locations or read-"just the line of a location for a claimant, but to ap-"ply the law as it is to the case presented, and if any "apparent hardship appears, let the locator who did "not, or could not locate his claim with due care bear "the consequences of his own act." We are aware of the fact that there are a few cases of inferior

Courts, at least *not* Courts of last resort, where the Court has undertaken the task of drawing new lines for the claimant and readjusting the location so as to give extra lateral rights. These cases are: The Tyler Mining Co. vs. Last Chance Mining Co. by the Circuit Court of Appeals at San Francisco, 61 Fed. 557, and Del Monte Mining Co. vs. New York and Last Chance Mining Co., 66 Fed. Rep. 212 by Judge Hallett of Colorado, and Consolidated Wyoming Co. vs. Champion Mining Co., 63 Fed. Rep. 540. In each case a writ of error to the Supreme Court of the United States was allowed on this very question of extra lateral right, but unfortunately the point has not been decided by this tribunal, in either of said causes.

It was the doctrine laid down in these three cases that was followed by the Supreme Court of Montana in the case at bar. The opinion of the Supreme Court of Montana in this cause is frank in this, that it acknowledges its views to be not wholly in accord with the decisions of the United States Supreme Court. It says, speaking of the Amy Silversmith case: "We "gave our best endeavor and research in that deci- "sion and arrived at a result which we were willing "to concede was not wholly in accord with the de- "cisions of the United States Supreme Court upon "that subject, but which we believed could, with a "very little effort, be reconciled with those decisions,

"and which we were wholly satisfied was the only "practicable solution of the problem in all its phases, "and which we were also wholly satisfied was fully "within the intent of the United States Mining laws."

Although the decision of the Supreme Court of the State was over-ruled in the Amy Silversmith case by the Supreme Court of the United States, we are told, in the present cause in the opinion of the Supreme Court of Montana, that they are still satisfied with their own opinion in the Amy Silversmith case, and here in the present cause they apply the same doctrine they held in the Amy Silversmith case, and which was reversed by this tribunal upon a proper appeal to this Court.

Let us here refer to the diagram, page 20 of the printed record exhibiting the Amy location and the strike of the vein. It will be observed that the Supreme Court of the State of Montana permitted the owners of the Amy to follow the vein on its dip under the Non-Consolidated claim westwardly to a plane drawn vertically downward through the line E. F. marked on the diagram "courts line." The other plane would be drawn through the point where the apex of the vein crosses the south line parallel to the line E. F. or 600 ft. from corner "I," the south east corner of the diagram. Under this construction as given by the Supreme Court of the State of Montana, the claimants in the Amy could follow all that part of

the vein which has its apex within the lines of the Amy location on its dip to the north and under adjoining claims.

This doctrine was totally reversed by the Supreme Court of the United States in that case, and it was there held that the owners of the Amy had no extra lateral rights, but were confined to so much of the vein as lies within planes drawn vertically downward through the surface lines of the location.

Let us now, for the sake of argument, refer again to the diagram on page 20. Let us shift the location of the claim a little farther to the east until the point E, where the apex of the vein strikes the north side line, shall be just east of corner "N" of the Amy location. Under such conditions, there is no doubt but the opinion of the Supreme Court of the United States would be identically the same as it has already been so ably expressed by this tribunal. Let us then by shifting the location of the claim farther east, until the point E on the diagram is identical with the point N, would the reasoning of the Court be changed? We think not.

Suppose that when the apex of the vein is so shifted westward on the location until the point E should be identical with corner "N" of the Amy location, would it make any difference whatever in the rights of the parties, or the reasoning of the Court if the point E, where the apex crosses the north side line,

should be so adjusted as to cross the west end line, say one foot south of corner "N" of the Amy location? We cannot think the Court could change its reasoning. The only difference would be a slight difference in the angle or degree with which the apex of the vein should strike or cross the several lines of the location.

If this slight variation in the movement of the apex of the vein is sufficient to change the whole reasoning of the Supreme Court in the case of King vs. Amy & Silversmith, then our position may not be tenable, but unless this slight variation on the degree of the strike of the vein should have that effect, then our contention is correct, and the opinion of the Supreme Court of Montana in the cause at bar should be reversed.

Again referring to the diagram on page 20 of the printed record, let us suppose that the location of the Amy lode was so shifted to the east that the point E, where the apex of the vein intersects the north side line of the location, should be exactly west of point "N," the north-west corner of the Amy location. In such a case, the apex of the vein would cross the west end line, and the south side line of the Amy location, and the question thus presented would be identical with the one we are here presenting. Would such shifting of the location in that case work a reversal of the opinion of the Supreme Court of the United

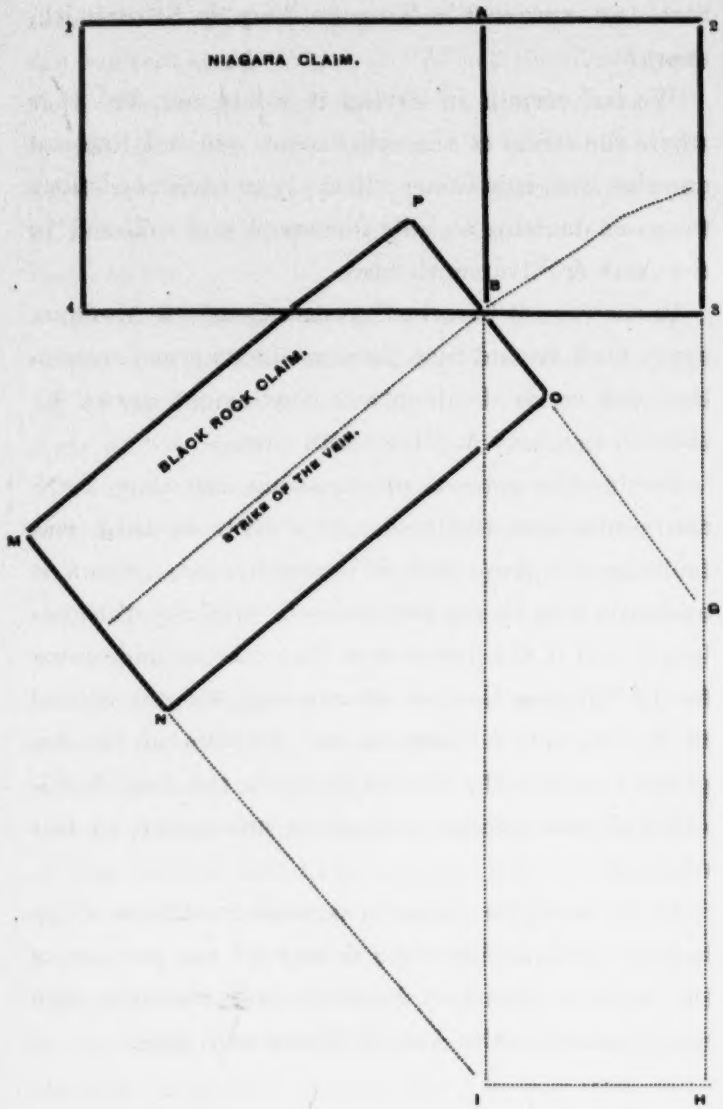
States as expressed in King vs. Amy & Silversmith, supra?

We feel certain in saying it would not, and that where the strike of the vein crosses one end line and one side line, this Court will apply to such conditions the same doctrine so ably discussed and affirm d in the Amy & Silversmith case.

In the case at bar, the Supreme Court of Montana apply for a second time the same doctrine and reasoning, and reach the identical conclusions drawn by them in the Amy & Silversmith case.

By no other process of reasoning can they reach the opinion here rendered, and if their decision was faulty in the Amy and Silversmith case, (which it evidently was by the fact of its reversal by this tribunal) and if the doctrine of that case as laid down by the Supreme Court was erroneous, then it cannot be correct now so long as the decision of the Supreme Court of the United States in the Amy & Silversmith case remains the law as announced by this tribunal.

There are in the present case such conditions which beyond cavil disclosed the fallacy of the position of the Supreme Court of Montana more forcibly than was apparent in the Amy & Silversmith case.


1
A
2
NIAGARA CLAIM.
P
B
4
3
BLACK ROCK CLAIM.
O
STRIKE OF THE VEIN.
M
G
N
I
H

For illustration, on the opposite page we present a diagram that will exemplify the error into which the Montana Court has fallen, and will illustrate conditions that would frequently arise if the views expressed in the opinion of the Supreme Court of Montana prevail and find lodgment in the jurisprudence of this country.

In the diagram which we present in this brief, instead of placing the "Black Rock" claim along side and parallel with the "Niagara," we present the "Black Rock" as having been located parallel with the strike of the vein, and necessarily at an angle with the "Niagara." Let the figures 1, 2, 3, 4 represent the four corners of the "Niagara," and the letters M, N, O, P, represent the corners of the "Black Rock," the dotted lines crossing through the east end of the "Niagara," and the south side line of said claim, will represent the strike of the vein passing out of the south side line of the "Niagara" at the point B, then the line B X will represent so much of the apex of the vein or lode as lies within the surface lines of the "Niagara." Under the doctrine announced by the Supreme Court of Montana, the owners of the "Niagara" would be entitled to all that part of the vein on its dip to the south into the earth, between planes drawn down vertically through the lines A, B and 2, 3 extended in their own direction to I and H, but under the law as stated in Section 2322

of the Rev. Stats. of the United States, the owner of the "Black Rock" claim, who went upon the public domain outside the lines of the "Niagara" and located his claim in conformity to the law, and parallel with the strike of the vein, has also a right to follow the same vein on its dip into the earth between planes drawn dawn vertically through his end lines M N and O P extended in their direction to the points G and I, and this right he would have without regard to the question of priority of location. See "Flagstaff Mining Co. vs. Tarbett, 98 U. S., p. 468 and 469, where the Supreme Court of the United States uses this language:

"The plaintiff in error contended and requested "the Court to charge, in effect, that having received "a patent for 2,600 ft. in length and 100 ft. in breadth, "commencing at the "Flagstaff" discovery on the lode "at the surface, it was entitled to 2,600 ft. of that lode "along its length, although it diverged from the lo- "cation of the claim and went off in another direc- "tion."

"We cannot think that this is the intent of the "law. It would lead to inextricable confusion. Other "locations correctly laid upon the lode and coming "up to that of the plaintiff in error on either side "would, by such a rule, be subverted and swept "away. Slight deviations of the out cropping lode "from the location of the claim would probably not

"effect the right of the locator to appropriate the "continuous vein, but if it should make a material "departure from his location, and run off in a differ- "ent direction and not return to it, it certainly could "not be said that the location was on that lode or "vein farther than it continued substantially to cor- "respond with it. Of what use would a location be "for any purpose of defining the rights of parties, if "it could be thus made to cover a lode or vein which "runs entirely away from it. Though it should hap- "pen that the locator by sinking shafts to a consid- "erable depth might strike the same vein on its sub- "terranean descent, he ought not to interfere with "those who having properly located along the vein "are persuing their right to follow the dip in a regu- "lar way. So far as he can work upon it and not in- "terfere with their rights, he might probably do so, "but no farther. And this consequence would fol- "low irrespective of the priority of the locations. It "would depend on the question as to what part of "the vein the respective locations properly cover and "appropriate."

There cannot be under the conditions presented in the diagram a possible doubt of the right of the "Black Rock" owner to follow the vein on its dip, and if the Supreme Court of Montana is right, the "Niagara" people will have the right to follow the same vein on the same dip to the same point, and

thus we would have presented the anomalous condition of two claimants owning one and the same part of the vein which is described in the diagram presented in this brief by the quadrilateral section B, G, H, I. They would thus have the right to the same property through opposing titles. This is the logical result of the doctrine announced by the Supreme Court of Montana, the consequence would be "confusion worse confounded." Such absurd conditions cannot result from applying to this case the same rule of construction applied by this Court to all the different analogous cases heretofore determined and ending with the case of King vs. Amy & Silversmith in 152 U. S. One or two of the District Judges of the United States have sought to evade the reasoning of that case and the results which follow from the adoption of the rule laid down by this Court. One of the cases is that of "Tyler Mining Co. vs. Last Chance Mining Co." decided by Judge Beattie, District Judge, and reported in the 71 Fed. Rep. page 848.

Let us for a moment examine the diagram which the learned Judge uses in his opinion on page 849 of the 71 Fed. Rep., and for the sake of argument, let us reverse or change the location of the "Last Chance" claim so that the north end line shall cross the strike of the vein at corner No. 4 of the "Tyler" claim, and let the "Last Chance" location be located along and

parallel with the strike of the vein. What would be the result? If the reasoning of Judge Beattie should be followed, the owners of the "Tyler" claim would have the right to follow the vein on its dip to the south, and by virtue of their location, the owners of the "Last Chance" claim would have the right to follow the same vein on its dip to the south and west. The result would be the same as in the illustration presented supra in our brief. Both claimants would have a right to the same portion of the vein under different and conflicting titles.

Judge Hallett of Colorado, also a District Judge, in the case of Del Monte Mining Co. vs. New York and Last Chance Mining Co. contends for the same doctrine 65 Fed. Rep. 212, and Judge Hawley in his decision in the case of the consolidated Wyoming Mining Co. vs. Champion Mining Co. 63 Fed. Rep., page 540, so far forgets the Statute law of the United States, and the rules laid down by the Supreme Court in construing such law, that he actually gives to the owners of the Wyoming and Ural lodes the right to follow their vein on its dip into the earth, between planes drawn down vertically through end lines which are *not parallel*, But these District Judges are confronted by Judge Knowles in the 49 Fed. Rep., page 291, in which he adopts the views expressed by the Supreme Court of the United States in the several cases where the question or similar questions have

been passed upon, and the learned Judge comes to the conclusion that it is no longer a debatable question. That where a vein passes through one end line and one side line of a claim, the owner has no right to follow such vein on its dip into the earth. The learned Judge in the decision uses this language:

"If it should appear that the apex of the "Blue "Bird" claim did not pass through the end lines of "that claim, but passed through *one end line and one* "*side line*, then the rights of the plaintiff at least are "determined by the case of "Iron Silver Mining Co. "vs. Elgin Mining & Smelting Co., 118 U. S. 196." " * * * The right of plaintiff to follow its vein "outside of its side lines if its apex is *not cut by both* "*end lines* of its claim, was fully determined in the "case just referred to."

It is exceedingly dangerous to Courts to begin to legislate in their decisions, or formulate judicial law to meet all the conditions which may arise upon any given question. The proper law-making authority is the legislative department, where a Statute is enacted by Congress or the Legislature in plain unequivocal terms, such as the law of May 10th, 1872, relating to the disposal of the mineral lands of the United States, there can be no legitimate reason for the Courts trying to evade or change that law. If changes are required, it should be done by legislative enactment and amendment. The danger to be encountered from

judicial legislation or decisions making new and different rules of construction is evident, for with the varying imagination of each Court or Judge, we may have a different rule or construction placed upon the law. The law as it is written in our Statutes should be followed, and where, as in this case, the question has been exploited and promulgated by the highest judicial tribunal in the land, the doctrine so announced should not be evaded by subterfuge by the lower Courts. Upon this question we see that Judge Hawley in the case of the Wyoming Consolidated Mining Co. vs. Champion Mining Co., 63 Fed. Rep. page 540, actually dispenses with section 2322 of the Rev. Stats. of the United States, which requires that the end line of a mining claim shall be parallel, and allows the claimants of a mining claim with end lines which are *not parallel* to follow the same on its dip into the earth, and the Supreme Court of Montana, as well as Judge Beattie, place themselves by their decision upon the dangerous ground of giving the two separate claimants the right to one and the same portion of a lode or vein, such claimants holding by different and conflicting titles. If this Court shall give to the case that consideration which we think the importance of the question demands, we are satisfied it can arrive at but one conclusion, and that judgment, will be in accordance with the doctrine so ably discussed in the case of King vs. Amy & Silversmith Mining

Co., supra. It is to be regretted that this question was not decided by this Court when it was presented in other cases, for such a decision then would have prevented an appeal in this case, but as it has never been decided, we trust the Court will lay down for future guidance a rule which will govern the rights of parties where the apex of a vein shall pass through one of the end lines and one of the side lines of the surface location of the claimant.

When such a rule is finally established, Attorneys and their clients will be advised of their rights. We feel constrained to believe that the rule should be established as we contend for in this brief, and relying upon the judgment and wisdom of this Court, we respectfully submit that the opinion of the Supreme Court of Montana should be reversed, with instructions that the defendants in error have no right to follow their vein on its dip or incline outside or beyond planes drawn vertically downward through the surface lines of their location.

ROBERT B. SMITH, and
ROBERT L. WORD.
Solicitors for Plaintiff in Error.

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[illegible]

Brief for Defendants in Error

JAMES W. FORNEY,
Attorney and Solicitor for Defendants in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WILLIAM A. CLARK, *Plaintiff in Error,* vs. WILLIAM F. FITZGERALD, ET AL, *Defendants in Error.*	**Brief for Defendants in Error.**

STATEMENT.

The defendants in error have submitted heretofore their motion to dismiss the Writ of Error herein, and their printed brief thereon.

In addition to the facts brought before the Court in the brief on motion to dismiss and also in the brief of the plaintiff in error, we desire to direct the Court's attention to one other matter, shown upon the diagram printed in connection with the opinion of the Supreme Court of Montana, and which should have some bearing both upon the merits of the case and upon the motion to dismiss:

In the diagram of the ground in controversy, printed in connection with the opinion published in the record, the Niagara Lode Claim is shown as having two end lines, and so far as can be ascertained from the plat, the vein in controversy passes through both of these end lines. According to this plat or diagram, the vein enters the Niagara Lode Claim through the east end line, passes along the general course of the claim through the south side line and continuing in its course westerly passes again into the Niagara Claim and then out at or near the southwest corner of the claim. As shown upon the diagram, the vein probably passes out of the west end line.

There is nothing in the record to show what are the facts relative to this matter. The evidence not being before the Court, there is nothing to show what, if anything, was proved on the subject, or what, if anything, the lower Court held relative thereto.

ARGUMENT

I.

What is the effect of a vein crossing both end lines of a claim when in its course it passes through a side line?

Whatever may be the opinion of the Court upon the effect of a vein entering an end line and departing through a side line and not returning again to the claim, we submit that the present case calls for the application of an entirely different principle.

In the case at bar we may say that the vein passes through both end lines of the Niagara Claim. This statement in itself, unqualified, gives to the vein extralateral rights, and if there was nothing more to the question there would be nothing for argument.

But here the statement must be qualified by adding that, for a considerable distance the apex of the vein departs from the claim.

What we shall have to say hereafter with reference to the object and purpose of end lines will apply with greater force in a case like the present, than where it is a plain question of an end line and a side line crossing.

All of the authorities which we shall hereafter cite will apply with greater force to the present case than to the facts which they have under discussion. On the other hand the Amy-Silver-

smith case upon which plaintiff in error relies most strongly cannot be applied to the present case. The ground of decision in the Amy case is that the claim is laid *across* and not *along* the vein. In the present case it cannot be disputed that the Claim is laid *along* and not *across* the vein. Both end lines cross the vein, but owing to conflicts with other claimants the Niagara has lost a portion of the apex which it attempted to locate.

We cannot think that the fact that a great part of the vein has been lost by the interference of the Black Rock Claim, can alter the rule for which we contend. Suppose the corner of the Black Rock Claim had been imposed over the Niagara Claim to such a slight extent as to take, say, a foot of the vein near the center of the Niagara Claim. Under these circumstances the Niagara would have retained, say, 1499 feet of the vein passing through both end lines of its location with a small section near the center excepted therefrom. Would extralateral rights exist under such state of facts. If so they must exist in the present case.

In addition to what we have submitted in our brief on the motion to dismiss, we desire to call the Court's attention to the additional facts hereinbefore stated as affecting the motion.

There being in this record no evidence and no bills of exception, this Court cannot be informed as to what took place in the trial court. Even the plat attached to the opinion of the Supreme Court of Montana may be erroneous, or it may be a map

constructed for the purpose of enforcing the reasoning of the opinion, as the diagram in the brief of plaintiff in error is admitted to be.

We only refer to these matters as showing the difficulties attending the review of a trial court when no questions of law are saved. As we have suggested in our former brief, whatever rulings were made upon the facts as shown were acquiesced in by the plaintiff in error, and now in the uncertainties and confusion in which we find this record this Court is asked to decide several most important and difficult questions which may or may not have been decided by the trial court. We think that the Court should refuse to do so.

Upon the record such as we have the plaintiff in error insists that the one single question of law is raised:

Do extralateral rights attach to a vein which on its strike passes through one end line and one side line of a quartz lode claim?

Without conceding that the question is raised by the record and without conceding that the vein passes through one side and one end line, but insisting that as shown by the record it passes through both end lines, we shall proceed to the discussion as though the facts were as stated by plaintiff in error and as though the question was properly before the Court for determination.

II.

Has the question ever been determined by this Court?

Counsel for plaintiff in error seems to labor under the illusion that the exact question, or a question involving the same principle, has been decided by this Court already and is inclined to criticise with some severity the decisions of other courts, that have put a different construction upon the decisions of this Court. Counsel seem to be of the impression that the lower courts well knew what this Court meant to apply as a rule under all circumstances, and that they have attempted to "evade by subterfuge" the proper construction of the statute as laid down by this Court.

We do not consider that this rather caustic criticism is at all deserved. We know of no lower courts having run counter to this Court upon this question.

Upon an entirely different state of facts, several of the lower courts have held to the doctrine of extralateral rights, and what counsel we think very illogically concludes is, that the difference in facts should not make any difference in the application of the rules laid down by this Court.

What this Court has decided as we understand it, and as we think the lower Courts have understood it, was: That when a vein on its strike crosses both side lines of a claim, such side lines become end lines, and the owner has no extralateral rights.

What the lower Courts have decided, in the cases referred to by counsel is, that where a vein crosses an end and a side line of a claim that the extralateral rights of the vein were not thereby destroyed. We shall see more of these decisions later on.

That the courts were only exercising a very proper judicial judgment in making this distinction we think should not be doubted. But aside from an independent judgment upon the question, this Court has in express terms stated that the question here presented has never been by this Court decided.

In the case of Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683, the following language is used by the Court:

"Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler Claim, the vein enters through an end and passes out through a side line, while by the amended location, it passes in and out through end lines. Of course, if the latter is a valid location, the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim, extended downward? It has been held by this Court in the cases heretofore cited that where the course of the vein is

across instead of lengthwise of the location, the side lines become the end lines, and the end the side lines; *but there has been no decision as to what extra territorial rights exist if a vein enters an end and passes out at a side line.* Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law,—that the owner of real estate owns all above and below the surface and no more? Or may the Court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?"

So far as we know, this is the last announcement of this Court upon this subject.

In view of this declaration, we do not feel that the question has been so far or at all concluded by this Court as to preclude its discussion.

III.

What is the effect upon extralateral rights of a vein crossing a side and an end line of a claim?

The statutes of the United States, under which extralateral rights are claimed and upon which they are founded, is embodied in Section 2322 of the Revised Statutes, and is as follows:

"The locators of all mining claims made, or which shall be hereafter made, on any mineral vein, lode, or ledge, situated on

the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations, not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lie inside such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."

Section 2320 defines the extent of mining locations and concludes with the sentence: "The end lines of each claim shall be parallel to each other." This sentence taken in connection with Section 2322, above quoted, shows very plainly that the

intent of the statute as originally passed was to give to each locator upon a vein the entire vein, to whatever depth it might extend, provided it should not extend beyond the end line planes, on the strike of the vein. When the vein in its strike passes through both end lines, there is nothing left for construction, but the owner by force of the statute has the right to the vein to the entire depth, wherever it may extend, the course of the dip being determined by the angle of the parallel end lines.

If a vein were altogether regular in its characteristics so that its strike, for instance, would always be in a regular or defined line, it would be an easy matter to define its dip by declaring that it should be at right angles, or some other angle, with the strike of the vein. But the practical miner as the framer of the statute well knew, found difficulties in determining with any certainty the strike of his vein. It rarely for any considerable distance follows a straight line, while the deviations therefrom are innumerable. Strictly speaking, we might say that the true dip of the vein is at right angles with its strike. But if a vein has no true strike it is impossible to ascertain its dip. One section of the vein for a short distance will have one dip, at right angles with its strike, while a few feet further on the dip must change to accommodate itself to a change in the strike. As a result of these irregularities, one point in the dip might be covered as to true dip by several points on the apex, when the vein bends in the direction of the dip. This is well exemplified by

observing a vessel larger at the top than at the bottom. There is not sufficient vein on the dip to represent the entire apex at the top.

On the other hand, if the strike of the vein curves from the dip, there will be more vein on the dip than on the surface. The same vessel turned upside down shows this.

It was to meet these difficulties that the act of May 10, 1872, required that the end lines of each claim should be parallel, and prohibited the claimant from passing beyond these end lines extended downward indefinitely in their own direction. Thus is obviated all vexing questions of true dip, and what part of the vein under ground belongs to the apex at the surface.

This being the reason for establishing parallel end lines, it follows as a logical conclusion that the establishment of the end lines not only marks the surface lines of the miner's possession, but performs the further function of establishing the line of dip of every vein found within the boundaries of the claim. There may be numerous veins within the claim and each may have a different course with many variations therefrom, but the line of the dip for one and all is in the same direction—the direction fixed by the end line.

If we are correct in this conclusion, it is but a step to the further logical conclusion that the end line fixes the plane appertaining to each claim, in the same manner as if the geological forma-

tion were made of stratifications one against the other and each parallel with the established end lines. Whatever point on the claim may be selected, whether it be at the end lines or the center of the claim, there is no uncertainty as to what is the plane of the claim, for it has been determined by the fixing of the end lines.

As before said, there may be many veins included within the boundaries of one claim. Some of these veins may both enter and depart through end lines. Here we have no difficulty in ascertaining the legal rights of the claimants. But another vein with a different strike may be included within the same claim, which may enter an end line and depart through a side line of the claim, as in the case at bar. With several veins having various courses, it can be easily seen that a location cannot be so laid that all veins shall pass through both end lines.

And yet the statute expressly declares that the claimant shall have, "all veins, lodes or ledges, throughout their entire depth, the top or apex of which lie inside such surface lines extended downward vertically, although such veins, lodes or ledges, may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

It is to be observed that there is nowhere in the law any condition attached to this grant. It is not provided that the vein shall pass through both end lines. On the contrary, the statute grants

all veins having their apexes within the surface lines, and this grant extends to the vein to its entire depth.

As in the present case of the vein passing through one end line and one side line, we have the line of the dip fixed by the one end line crossed. The question then arises, has the law fixed another parallel and imaginary end line at the point where the vein crosses the side line?

If the law has not expressly or impliedly established such a line, will not the courts establish it for the purpose of carrying out the very evident intention of the law-maker?

We think the law has itself by an irresistible implication supplied the line. As we have before argued, the plane of the claim, and consequently the plane of the dip of each vein, has been fixed and determined in the establishment of the end lines. The vein to its entire depth has been granted to the claimant. The only difficulty in the way of giving efficacy to the grant is in determining what dip shall attach to the vein. If the law has established the dip, as it certainly has, all difficulties disappear and the grant becomes perfect.

If, however, it be held that such a line is not established by the statute, then we submit that the Court should construct one in order that the fair, reasonable and evident meaning of the statute may be given effect. In the construction of this, as of every other statute, the purpose and intention of the law is to be

sought. If it be necessary to establish a line in order that the purpose of the law-maker may be carried into effect, then it is not only the right, but the plain duty of the Court to establish it. By so doing, the purpose of the law is secured, while on the other hand, the refusal to do so defeats the purpose. But even after the Court has declared the line to exist, it cannot be said to be a creation of the courts, for the law, at least by intendment, constructed it.

If there be any objection to the establishment of a new end line at the point of departure, it would be equally well to leave it undone. All that is contended for in cases of this kind is that the owner of the vein may follow it on its dip wherever it may go. Why may it not then be said that the owner of the claim is the owner of the vein, so far as it is included in his claim, and that he has the right to follow it on its dip, that dip being determined by the plane of the claim as established by the end lines? Such a construction would be in accordance with the spirit and letter of the law, and would be free from the objection of judicial legislation.

We believe that this statute has been construed as we contend for, by nearly all of the lower courts, and we think we may say with confidence that it has been so construed unanimously by those directly interested in the mining industry. This construction being from a practical standpoint and having been contemporaneous with the enactment of the statute, and having con-

tinued and been acted upon in all practical matters since, we submit should have respectful consideration, from this and all courts in the determination of this question. These considerations we admit should not be urged if such constructions were plainly contrary to the intention and meaning of the law. On the contrary, they seem to us to be in accordance with the just and fair construction of the statute.

IV.

As to certain practical objections urged by plaintiff in error:

Counsel for plaintiff in error refers to the conditions existing in the Amy-Silversmith case, a diagram of which appears at page 20 of the printed record in this case. Counsel then asks the Court to suppose the strike of the vein so changed that it would pass through the west end line, instead of through the north side line, as shown in the diagram. Counsel then asks if such a slight change could make any difference in the rulings of the Court. The difference in facts is between a vein crossing an end line and a side line. The difference in law is the very question now under discussion.

If, after counsel had readjusted the claim to the vein in such a manner that one end line crosses the vein, he had made a like adjustment, so that the other end line should in like manner cross it, we should have a claim laid along and not across the vein. In such a case the vein would unquestionably have extralateral

rights, although the adjustment to bring about this effect might be very slight. In like manner we contend that the differences supposed by counsel, while slight, constitutes the difference between a vein having and one not having extralateral rights.

There is also shown in counsel's brief a diagram, used for illustration. From this diagram it is contended that conflicts might occur in underground rights by reason of the fact that veins cross one side line of a location. We submit that these conflicts are quite as likely to occur in cases where veins cross both end lines as where they cross an end line and a side line.

Take for instance this same diagram, and instead of having the Niagara Claim represented by the figure 1, 2, 3 and 4, let us suppose that the Niagara Claim is represented by the parallelogram A, B, 3, 2, and that the Black Rock Claim and the vein remain as they are represented on the diagram. Here we would have a vein passing through both end lines of the Niagara Claim, and the identical complication arising which counsel claim to avert by destroying the extralateral rights of the Niagara Claim.

An inspection of a map of any important mining district will show claims laid in most irregular fashion. The extralateral rights attaching to these claims must be always theoretically and very often in practice, very conflicting. This results, whether the veins pass through both end lines or one side line, and the

denial of extralateral rights altogether, in either instance, would not tend to cure the trouble.

It is a demonstrable fact that extralateral rights on a vein crossing a side line would not and could not complicate the situation more than it would be complicated by veins passing through both end lines.

V.

The adjudicated cases upon the question:

Counsel for plaintiff in error have cited several cases which it is contended support the doctrine as applied by them. Among the cases cited are several decisions from this Court which are claimed to have special applicability. We think these decisions could be shown upon review to be founded upon the peculiar facts of the cases decided. But in view of the declaration of this Court, that a case like the present has never been decided by this Court, we refrain from the useless labor of attempting to convince the Court that it was correct in that declaration.

So we think we may conclude that the question so far as this Court is concerned, stands undecided. As to the other cases cited by plaintiff in error, a slight examination will show that none of them support the views contended for.

In *Montana Company vs. Clark, 42 Fed., 626,* Judge Knowles held that a claim in the form of an isosceles triangle could not claim to have extralateral rights, for the reason that it

could not have parallel end lines, as required by law. As we have before argued, no plane of the dip was established in the location of the claim.

In *Colorado Cent. Con. M. Co. vs. Turck, 50 Fed., 888*—Judge Thayer, writing the opinion in the Circuit Court of Appeals, held that, when a vein forks and the apex of one fork passes into another claim that such fork belongs to such claim. A question over which there should be no contention. But in that case the Court went further and did as we contend should be done—drew an end line at the point of the departure of the vein through the side lines, and by such lines defined the extralateral right of the vein. At page 896 of the decision the Court says:

"If the vein on which the Colorado Central Location rests became divided as it entered the disputed territory, and the outcrop of one fork crossed into the Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and in that event we are of the opinion that the defendant lost that fork of the vein which had passed outside of its sidelines. In other words, so far as that fork is concerned, the south end line of defendant's Colorado Central Claim must be regarded as *a line drawn through the point where the outcrop passed through its south side line.*"

It is therefore plain that this is an authority for the position taken by us.

In *Blue Bird M. Co. vs. Largey, 49 Fed., 289*, the defendant moved to remand the cause to the State Court. In the course of the opinion remanding the cause, Judge Knowles used the following language:

"But if it should appear that the apex of the Blue Bird vein did not pass through the end lines of that claim, but passed through one end line and one side line, then the rights of plaintiff, at least, are determined by the case of Iron Silver Min. Co. vs. Elgin Mining and Smelting Co., 118 U. S., 196; 6 Sup. Ct. Rep., 1177."

"As to the right of plaintiff to follow its vein outside of its side lines, if its apex is not cut by both end lines of its claim, was fully determined in the case of Iron Silver Min. Co. vs. Elgin Mining and Smelting Co., supra, just referred to."

It will be seen that the decision was based altogether upon a construction of a decision of this Court. If that decision does not bear the construction given it, then Judge Knowles' decision would be without weight.

The case of *Tombstone M. & M. Co. vs. Way Up M. Co., 25 Pac., 794*, is a cause decided by the Supreme Court of Arizona. The Court held that where a vein crosses both side lines of a claim no extralateral rights attach to such veins. The question decided in this case is identical with that decided in the Amy case, and is not an authority for the plaintiff in error.

McCormack vs. Varnes, 2 Utah, 355, is a case in which the vein passed both side lines of the claim on its strike and the Court held that the claimant could not pursue the vein beyond the side line *on its strike.* We do not find that the question of dip was raised or discussed in the case.

Thus we find that in not a single case cited by plaintiff in error was the question here in issue discussed or decided.

On the other hand this identical question has arisen and been decided, as we contend is correct, in the following cases:

Tyler M. Co., vs. Sweeney, 54 Fed., 284.

Consolidated Wyoming G. M. Co. vs. Champion M. Co., 63 Fed., 540.

Del Monte M. & M. Co. vs. New York & L. C. Min. Co., 66 Fed., 212.

Tyler M. Co. vs. Last Chance M. Co., 71 Fed., 848.

Carson City G. & S. M. Co. vs. North Star Min. Co., 73 Fed., 597.

Republican M. Co. vs. Tyler M. Co., 79 Fed., 733.

Fitzgerald vs. Clark, 17 Mont., 100 (the case at bar).

The question is also discussed and the same principle announced in,

Doe vs. Sanger, 83 Cal., 203.

In *Tyler Mining Company vs. Sweeney, 54 Fed., 284,* Judge Hawley discussing this question, at page 292, says:

"If the lode in question, instead of extending into the Last Chance Location, had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there would certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course, for its entire depth outside of the vertical plane drawn through the side lines. The fact that it continued its course and crossed the side line does not in any manner change this principle. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice and authority, it seems to us, is the only reasonable construction that can be given to the statute."

Judge Hawley again in discussing the case of the *Consolidated Wyoming Co. vs. Champion M. Co., supra,* says:

"I am of opinion that in such cases the statute is definite enough and clear enough to make the end lines parallel at the point of the entrance and of the departure of the lode across the side lines and to draw them crosswise of the general course of the lode within the limits of the surface location, and that this should always be done, so as to give to the locator just what the statute evidently intended he should have, instead of depriving him of all extralateral rights because, by some mistake or oversight in

making his lines, or by lack of judgment or knowledge as to where the lode ran, he had failed to get his lines exactly parallel with the lode and had marked his end lines at a point beyond where the lode was found to exist upon its strike within the surface lines of his location. But be that as it may, the Amy case does not go to the extent of deciding that if the lode passes through one end line and in its entire course is nearly parallel with the side line, which it crosses before reaching the other end line the locator would be deprived of all his extralateral rights."

And again:

"The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. When the prospector discovers a vein of ore of sufficient value to justify the expenditure of time, labor and money to open up and develop the same he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral as to the depth of such lode upon its dip, the apex of which is within the surface lines of his location."

And again:

"One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the Court as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered by the Court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

Judge Hallett in the case of *Del Monte M. & M. Co. vs. New York & L. C. M. Co., 66 Fed., 212*, used the following language:

"If the strike of the lode in the New York Location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim.

This is asserted as a proposition of law deducible from several decisions of the Supreme Court that the lines of a location crossed by the apex of a vein on its strike, shall, as to such vein, be regarded as end lines, whatever their position may be; and if this proposition be accepted the south end line and east side line intersected by the outcrop of those lodes are not parallel to each other, as demanded by Section 2320 of the Revised Statutes. This, however, has not been the interpretation of the law in the Supreme Court, or in any court, so far as we are advised. It is true that in the Flagstaff Case, 98 U. S., 463, and recently in the Amy-Silversmith Case, 152 U. S., 223, the Supreme Court declared that the side lines of a location shall be end lines whenever the lode on its strike crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principles of these decisions. We have a lode extending on its strike on the general course of the location and within its side lines, a distance of 1,070 feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side line. No reason

is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere, because the Court cannot make a new location or in any way change that made by the parties.

Iron Silver Min. Co. vs. Elgin Mining and Smelting Co.,
118 U. S., 196.

This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and if there be magic in the word "line" it will be better not to use it."

Judge Beatty in discussing the same question in *Tyler M. Co. vs. Last Chance M. Co., 71 Fed., 848*, says:

"What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following, "all veins, lodes and ledges throughout their entire depth, the top or apex of which lie inside of his surface lines." Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he

owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner. Courts will not fritter them away by engrafting into the law antagonistic common-law principles, or other judicial legislation. Is there any difficulty in applying these rights to a location wherein the ledge passes through an end and a side line? What are the planes that must then bound the underground rights? It will be conceded that the plane of the end line through which the ledge passes shall be one. The statute says that the right to follow the ledge along its course underground shall be limited by the planes passed through the two end lines, but it is manifest that this rule cannot be followed when the apex of the ledge, before reaching the other end line, passes out of a side line, for it would give the locator more of the ledge underground than he has of apex. It would give him a portion of the ledge of which he does not hold the apex, and to hold that his ledge shall be cut off by the vertical plane of his side line is cutting off the right to follow it down which the law has given him. Instead, thereof, to establish at the point where the apex crosses the side line a vertical plane, parallel to the plane of the end line cut by the apex, and allow him to follow the ledge on its dip between these two planes, is not in violation of any provision of the statute, and gives the miner no greater rights than the statute intends he should have. The courts by the cases above cited

have so held, and it is now held that the plaintiff can so follow its edge so far as not in conflict with some prior right."

The identical principle is again announced in the other Federal cases cited. The opinions were written by Judges Hawley and Beatty, both of whom we have before quoted in other cases.

The opinion of the Supreme Court of Montana in the case at bar is printed in full in the record and speaks for itself.

After this review of the cases, and we think every case upon the subject has been cited, we feel that we may confidently reassert what has been before said, that there is practical unanimity among the courts of the mining States upon the question here at issue. The judges of these courts are to a greater or less extent informed upon practical mining questions, and upon the difficulties to be met and disposed of in applying the reasons and principles that led up to the enactment of the statutes. They have seen, as probably none could see and understand, except those who have become familiar with such matters in a practical way, what are the necessities of the practical miner. They also understand what construction of the statute would best subserve, not individual interests, but the general interest and welfare of large and important communities where mining interests are of vital import.

We therefore urge with some importunity, in the interest of the principle and not in view of the special case, that these

courts be given a proper hearing and due consideration in the determination of this very important question.

JAMES W. FORBIS,
Attorney for Defendants in Error.

No. 145

Sup. Ct. of Forbes Jas. O. Co.

Filed Dec. 6, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

JAMES W. FORBES,
Attorney for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-6-'97

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Since the brief of defendants in error was filed in this Court a very able (and perhaps the first) text book upon the laws of mines has been issued. We refer to Lindley on Mines, and ask the Court to permit us to add to our former brief some citations from this work. Especially is this appropriate for the reason that the case at bar is ably discussed in the light of all decisions referred to in the briefs of both parties, and the author holds that the reasoning of Judge De Witt in this case is logical and conclusive. We quote from sections 591 and refer the Court to former and subse-

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quent sections of the same work for text as well as for diagrams:

"Let it be conceded absolutely that where a vein crosses any line of a location, the crossed line becomes an end line in the sense that it stops the right of pursuit on the *course or strike* of the lode. All courts agree upon this.

"The doctrine applied by Judge De Witt in the King-Amy and Fitzgerald-Clark cases, by Judge Hawley in the Tyler-Last Chance case, and by Judge Hallett in the Del Monte case recognizes this fully. The doctrine as contended for by them constructs a plane with reference to a boundary crossed by the lode lawfully designated by the locator as an end line.

"It stops the pursuit of the vein on its strike, which result is also accomplished by the crossed line. It gives to the locator as much of the lode in depth as he has within his surface lines. It takes away nothing that could be lawfully appropriated by any one else. A case more forcibly illustrating the inherent equity of the rule than that shown in Fitzgerald *vs.* Clark could hardly be assumed.

"If the extreme doctrine is to prevail, that no extra-lateral right is to be allowed where a vein crosses an end and a side line, the Niagara's rights are cut off by a plane drawn through its south side, H B. This gives to the Black Rock an underground segment of the vein underlying its surface for its full length, with only a small portion of the apex. In other words, it holds more of the vein underneath within its own boundaries than it has overlying apex, but its pursuit of the vein on its downward course is cut off by the plane drawn through L M, its south side line. The remainder of the vein lying south of such vertical plane cannot be thereafter appropriated by any one under the mining laws, because there is no apex upon which to predicate such a location. Either the Niagara or the Black Rock, had they been able to obtain sufficient knowledge of the position and course of the vein, might have taken the full length and depth; but, as they were mistaken in their surmises as to the course of the vein, and so made their locations that it crossed the common side boundary, one receives practically nothing and the other obtains something which the law did not intend he should have, and fails to receive all

of the vein underlying his apex, which the law contemplated that he should take.

"If, on the contrary, Judge De Witt's theory is adopted and a bounding plane, A K, parallel to the end line H L is applied at A, the point of crossing the side line, each locator receives a segment of the vein throughout its depth equal in length to the apex within its surface boundaries. There is a complete appropriation of the vein for the entire length and depth. Any subsequent location would be necessarily based upon a portion of the apex not included within the boundaries of either the Niagara or Black Rock, and such junior locator would have no just cause of complaint. This seems to fulfill the intent and spirit of the law. It gives to the locator as much of the vein as the irregularity and imperfection of his location will permit without depriving others of any legal rights. It brings order out of chaos, and certainty out of uncertainty. It does substantial justice to all concerned. Is not this the true end and object of statutory interpretation?

"The objection that this is a judicially constructed end line seems to us to be plausibly met by the reasoning of Judges De Witt, Hawley, and Hallett. The application of such a plane is neither arbitrary nor conventional. The direction of it is fixed by reference to the line properly designated by the locator as an end line. While the rule yet awaits the authoritative sanction of the Supreme Court of the United States, when we consider the practical unanimity with which both trial and appellate courts in the mining regions have accepted it as the only proper solution of the question, we express the belief that the Court of last resort will not withhold its approval."

Another new work, entitled "The Law of Mines and Mining in the United States," by Barringer and Adams, which has likewise been published since the filing of our brief, lays down the following principles at page 440:

"The locator is bound by the lines which he himself lays out, and the courts have treated those lines as end lines through which the vein passes on its strike or course across the country, whether the locator so intended them or not. If, therefore, the location is made across the vein, the side

lines become the end lines, and in following the vein upon its downward course he is confined *within the plane drawn vertically through those lines* extended. *If, however, one of the end lines as drawn crosses the vein, which on its onward course through the claim passes out of one of the side lines before reaching the other end line, the law will establish one new end line, which is a line parallel to the other end line as laid out, but passing through the point where the apex of the vein as it passes out of the claim intersects the side line, the other end line remaining the same as laid out.* The locator may even himself abandon the portion of his claim beyond this point of intersection and lay out a new end line as above."

Respectfully submitted.

JAMES W. FORBIS.
Attorney for Defendants in Error.

CLARK *v.* FITZGERALD.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 145. Argued December 7, 8, 1897. — Decided May 23, 1898.

The answer given to the fourth question in *Del Monte Mining and Milling Co.* v. *Last Chance Mining and Milling Co. ante*, 55, compels an affirmance of the judgment below in this case.

THE case was thus stated by the plaintiff in error in his brief.

The plaintiff in error is the owner and in possession of the Black Rock lode mining claim situated in the Summit Valley mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the Niagara lode mining claim situated in the same district and county. The Niagara lode lies along side of the Black Rock lode so that the south side line of the Niagara forms or is a part of the north side line of the Black Rock lode.

The Black Rock lode is the older of the two locations. As appears from the pleadings in the cause the vein or lode crosses the east end line and south side line of the Niagara lode 513 feet west of the northeast corner of the Black Rock lode and dips to the south and under the surface of the Black Rock lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the Black Rock and Niagara lode claims and extracted ore

from the said vein on its dip under the Black Rock lode at the point above described, and which is designated on the diagram as "ore bodies."

Thereupon the defendants in error, who as stated *supra*, own two thirds interest in the Niagara lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of $27,242.54, being two thirds the value of the ore extracted and for the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower court was affirmed.

Mr. Robert B. Smith for plaintiff in error. *Mr. Robert L. Wood* was on his brief.

Mr. James W. Forbis for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The case is before us on error to the Supreme Court of Montana. It is unnecessary to state its facts in detail, and it is sufficient to say that the answer given to the fourth question in the opinion just filed in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, *ante*, 55, compels an affirmance of the judgment.

Affirmed.